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In the Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES OF AMERICA, PETITIONER

v.

JOHN DOE NO. 462

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Whether the Fifth Amendment privilege against compelled self-incrimination protects the contents of an individual's voluntarily prepared financial records.

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UNITED STATES OF AMERICA, PETITIONER

v.

JOHN DOE NO. 462

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-12a) is not yet reported. The opinion of the district court (App., *infra*, 13a-14a) is unreported.

JURISDICTION

The judgment of the court of appeals (App., *infra*, 16a) was entered on September 24, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment provides in pertinent part:

> No person * * * shall be compelled in any criminal case to be a witness against himself * * *

STATEMENT

1. A federal grand jury in Alexandria, Virginia, is investigating a variety of narcotics, tax, and currency violations believed to have occurred from 1974 to the present. Respondent is a target of the investigation, which is currently exploring evidence that he and others distributed large quantities of marijuana and hashish in the Eastern District of Virginia and elsewhere in the United States. Internal Revenue Service agents are assisting the investigation to determine, inter alia, whether respondent's participation in the narcotics enterprise yielded unreported income. See App., *infra*, 2a.

In March 1984, the grand jury caused a subpoena to be served on respondent directing him to appear before the grand jury on April 17, 1984, and to bring with him a variety of documents (App., *infra*, 17a-20a). The items demanded encompass approximately a dozen kinds of common financial records, including records of real estate transactions, bank statements, cancelled checks, loan agreements, brokerage account records, and credit card receipts. The subpoena also required respondent to furnish records of payments made to attorneys, funds deposited with attorneys or law firms, and records of the purchase, sale, or distribution of controlled substances, including documents naming suppliers and customers. In addition, the subpoena demanded production of financial records maintained by respondent's businesses, including sole proprietorships.

Respondent agreed to furnish the records of his businesses, but he moved to quash the remainder of the subpoena, asserting (1) that it was overbroad and sought production of material irrelevant to the investigation and (2) that the required production of "personal" records violated his Fifth Amendment privilege

against self-incrimination. See C.A. App. 7-8. The government responded by offering act-of-production immunity with respect to the records covered by the claims of privilege. See App., *infra*, 1a-2a, 5a. The district court rejected respondent's argument concerning overbreadth and irrelevance. However, the court granted the motion to quash that part of the subpoena requiring respondent to produce "his personal, as opposed to his business[] records" (App., *infra*, 13a). In response to the government's argument that the contents of preexisting records are not protected by the Fifth Amendment privilege, as interpreted in *United States* v. *Doe*, No. 82-786 (Feb. 28, 1984), the court stated (App., *infra*, 13a n.1) that *Doe* "concerned only business records." The court observed (*ibid.*) that "the logical extension" of *Doe* "is to exempt private papers from Fifth Amendment protection." The court acknowledged that *Boyd* v. *United States*, 116 U.S. 616 (1886), which held that the contents of "private papers" are protected by the Fifth Amendment privilege, had been "discredited insofar as business records are concerned" (App., *infra*, 13a n.1), but it nevertheless felt "obliged" to follow *Boyd* until it was expressly overruled.

The court directed respondent to furnish for in camera inspection a list of all documents asserted to be personal, together with sufficient identification to enable the court to determine whether each listed document was a "personal" or a "business" record. See App., *infra*, 13a. At the same time, and at the government's unopposed request, the court granted respondent formal immunity for the act of producing the documents, pursuant to 18 U.S.C. 6002 and 6003. C.A. App. 57-58; see App., *infra*, 1a-2a, 5a.

Following its inspection of the list respondent furnished, the court concluded that the documents designated were "clearly * * * personal" and therefore exempt from production to the grand jury (App., *infra*, 13a). The court noted that, ironically, "many of the documents consist of checks, vouchers or [other] documents, the original or copies of which are in the hands of third parties. These probably could be obtained from the third parties by a grand jury subpoena if the government knew their whereabouts" (App., *infra*, 13a-14a).[1]

2. The court of appeals affirmed (App., *infra*, 1a-12a), relying (*id.* at 7a) on "the long-standing holding of the Supreme Court, first enunciated in *Boyd*." The court noted that *Boyd* had refused to recognize any substantial difference between the "seizure of a man's private books and papers" and "compelling him to be a witness against himself." App., *infra*, 8a-9a, quoting *Boyd*, 116 U.S. at 633. The court then quoted *Boyd*'s statement (116 U.S. at 634-635) that "compulsory production of the private books and papers of the owner of goods sought to be forfeited in such a suit is compelling him to be a witness against himself, within the meaning of the Fifth Amendment to the Constitution." App., *infra*, 9a.

The court of appeals observed (App., *infra*, 9a) that statements in several decisions of this Court, culminating with the decision in *Bellis* v. *United States*, 417 U.S. 85 (1974), "reaffirmed *Boyd*'s essential holding." The court then stated (App., *infra*, 10a) that "[n]o later decision of the Supreme Court has held to the contrary on the point directly in issue" and that none of this Court's more recent decisions "has overruled *Boyd*."

---

[1] The district court did not, however, regard the availability of respondent's personal papers to third parties as constituting a waiver of respondent's Fifth Amendment privilege (App., *infra*, 14a).

Specifically, the court believed that "dicta" in *Fisher* v. *United States*, 425 U.S. 391 (1976), and *Doe* did not require a different result, because "[t]he *Fisher* Court took pains to distinguish *Boyd*," while *Doe* "merely reiterated the well-established premise that an individual holding the documents of an artificial entity, whether a corporation, partnership or sole proprietorship, cannot assert a fifth amendment privilege." App., *infra*, 10a.

The court rejected the government's argument that the subpoenaed documents were not personal in any meaningful sense and were indistinguishable from the financial records at issue in *Doe*. The court did not disagree with the proposition that the records were essentially identical to the proprietor's records in *Doe*, but it declined "to engage in a case-by-case content-based determination of the privacy interest attendant to a given document. The proper line, we feel, has been drawn—whether the documents are held in an individual or representative capacity" (App., *infra*, 11a n.12).

REASONS FOR GRANTING THE PETITION

This case presents an important and frequently recurring question regarding the scope of the Fifth Amendment privilege against compelled self-incrimination when an individual's voluntarily prepared business or financial records are subpoenaed. In holding that the privilege could ever protect the contents of such documents and in fact did so here, the court of appeals refused to heed this Court's unambiguous teaching in *Fisher* and *Doe*, preferring instead the thoroughly discredited view of the Fifth Amendment privilege derived from *Boyd*. Not only is the decision "in conflict with applicable decisions of this Court" Sup. Ct. R. 17.1(c)), but the court of appeals' error is of considerable practical importance because the financial records of individuals are often of great value in detecting and investigating crime and are therefore subpoenaed fre-

quently. Prompt correction of the court of appeals' decision is accordingly needed.

1. The court of appeals held that the Fifth Amendment privilege protects the contents of voluntarily prepared business records. This view of the privilege was emphatically rejected by this Court in *Fisher* and *Doe*.

In *Fisher*, taxpayers under investigation by the Internal Revenue Service retrieved papers from their accountants and delivered them to their attorneys (425 U.S. at 394). None of the documents was prepared by the taxpayers, but the documents contained information taken from the taxpayers' books and records (*ibid.*). The Court held that the attorneys could not resist an IRS summons on the ground of attorney-client privilege because the Fifth Amendment would not have prevented compelled disclosure of the documents if they had remained in the possession of the taxpayers themselves. The Court explained (*id.* at 409):

> A subpoena served on a taxpayer requiring him to produce an accountant's workpapers in his possession without doubt involves substantial compulsion. But it does not compel oral testimony; nor would it ordinarily compel the taxpayer to restate, repeat, or affirm the truth of the contents of the documents sought. Therefore, the Fifth Amendment would not be violated by the fact alone that the papers on their face might incriminate the taxpayer, for the privilege protects a person only against being incriminated by his own compelled testimonial communications.

The Court went on to stress that the Fifth Amendment does not protect any privacy interest in the contents of documents even when the documents have been written by the person asserting the privilege (425 U.S. at 410 n.11). Rather, the Court observed, the

privilege applies only when the accused is compelled to make a testimonial communication that is incriminating (*id.* at 399, 408), and therefore "unless the Government has compelled the subpoenaed person to write the document * * * the fact that it was written by him is not controlling with respect to the Fifth Amendment issue" (*id.* at 410 n.11). The Court recognized (*id.* at 410), however, that in some circumstances the compelled act of producing a document pursuant to subpoena might be considered the equivalent of incriminating testimony—either because the act concedes "the existence of the papers demanded and their possession or control by the taxpayer" or because it serves to authenticate them.

Fisher's explication of the Fifth Amendment privilege made perfectly clear that while the act of producing a document might in some circumstances be tantamount to "testimony" within the protection of the privilege, a person cannot avoid compliance with a documentary subpoena based solely upon the contents of a document that was not prepared under government compulsion. However, while *Fisher*'s reasoning had implications extending far beyond the particular situation in that case, the Court concluded its opinion by stating (425 U.S. at 414):

> Whether the Fifth Amendment would shield the taxpayer from producing his own tax records in his possession is a question not involved here; for the papers demanded here are not his "private papers," see *Boyd* v. *United States*, 116 U.S., at 634-635.

Seizing on this passage, several lower courts held that the Fifth Amendment privilege shielded the contents of voluntarily prepared records under a "protection-of-private-papers principle" derived from *Boyd*. *In re Grand Jury Empanelled March 19, 1980*, 680 F.2d 327, 332-333 n.7 (3d Cir. 1982), rev'd in part and aff'd in

part *sub nom. United States* v. *Doe*, No. 82-786 (Feb. 28, 1984); see also *United States* v. *Miller*, 660 F.2d 563, 566-567 (5th Cir. 1981); *United States* v. *Davis*, 636 F.2d 1028, 1043 (5th Cir.), cert. denied, 454 U.S. 862 (1981). We therefore petitioned for certiorari in *Doe* to resolve the question "whether the Fifth Amendment protects the contents of an individual's business records" (82-786 Pet. 9).

The Court granted review and unambiguously answered that question, holding that the contents of such records are not protected. The Court wrote (*United States* v. *Doe*, slip op. 5-7; footnotes omitted):

> The Court in *Fisher* expressly declined to reach the question whether the Fifth Amendment privilege protects the contents of an individual's tax records in his possession. The rationale underlying our holding in that case is, however, persuasive here. As we noted in *Fisher*, the Fifth Amendment protects the person asserting the privilege only from *compelled* self-incrimination. 425 U.S., at 396. Where the preparation of business records is voluntary, no compulsion is present.
>
> * * * * *
>
> Respondent does not contend that he prepared the documents involuntarily or that the subpoena would force him to restate, repeat, or affirm the truth of their contents. The fact that the records are in respondent's possession is irrelevant to the determination of whether the creation of the records was compelled. We therefore hold that the contents of those records are not privileged.

Justice O'Connor filed a separate concurring opinion "to make explicit what [was] implicit in the [Court's] opinion: that the Fifth Amendment provides absolutely no protection for the contents of private papers of any kind." See *United States* v. *Doe*, *supra*.

Although three members of the Court dissented in part, none suggested that the contents of voluntarily

prepared business records enjoy any Fifth Amendment protection. In fact, Justice Marshall, joined by Justice Brennan, pointedly noted (*United States* v. *Doe*, slip op. 2; footnotes omitted) that "the documents at stake here are business records which implicate a lesser degree of concern for privacy interests than, for example, personal diaries."

2. The court of appeals gave two reasons for refusing to follow the teaching of *Fisher* and *Doe*. First, the court chose to follow *Boyd*'s conflicting interpretation of the Fifth Amendment privilege because this Court has never expressly overruled *Boyd*. But while this Court has not overruled *Boyd* in so many words, it has left no doubt that *Boyd*'s interpretation of the Fifth Amendment is erroneous and should not be followed. In *Fisher*, the Court noted (425 U.S. at 408) that "[t]he pronouncement in *Boyd* that a person may not be forced to produce his private papers has * * * often appeared as dictum in later opinions of this Court." However, the Court explained (425 U.S. at 409) that "the foundations for the rule have been washed away." The Court added (*ibid.*):

> In consequence, the prohibition against forcing the production of private papers has long been a rule searching for a rationale consistent with the proscriptions of the Fifth Amendment against compelling a person to give "testimony" that incriminates him.

The Court also expressly rejected the argument, which the court of appeals in this case adopted (see App., *infra*, 11a-12a), that the Fifth Amendment privilege was intended to protect privacy in a generalized way. The *Fisher* court wrote (425 U.S. at 399; footnote omitted):

> Within the limits imposed by the language of the Fifth Amendment, which we necessarily observe, the privilege truly serves privacy interests; but the

> Court has never on any ground, personal privacy included, applied the Fifth Amendment to prevent the otherwise proper acquisition or use of evidence which, in the Court's view, did not involve compelled testimonial self-incrimination of some sort.

Decisions of this Court holding that an individual's papers may be seized pursuant to a search warrant (*Andresen* v. *Maryland*, 427 U.S. 463 (1976)) and that testimony otherwise protected by the Fifth Amendment may be compelled pursuant to a grant of immunity (*Kastigar* v. *United States*, 406 U.S. 441 (1972)) also leave no room to argue that the Fifth Amendment privilege exists for the independent purpose of protecting personal privacy.

Following *Fisher*, *Doe* further confirmed *Boyd*'s demise. Faced with a court of appeals' decision that "continued to recognize *Boyd*'s protection-of-private-papers principle" (680 F.2d at 332-333 n.7), the Court again made clear that this view of the Fifth Amendment privilege had been discredited (*United States* v. *Doe*, slip op. 5-6 & nn.8, 10). The Court noted (slip op. 7 n.10) that *Andresen* had "dismissed" the argument that dicta from later cases continued to support *Boyd*. And, the Court continued (*ibid.*):

> Although *Andresen* involved a search warrant rather than a subpoena, the underlying principle is the same in this context. If the party asserting the Fifth Amendment privilege has voluntarily compiled the document, no compulsion is present and the contents of the document are not privileged.

The court of appeals' second reason for refusing to apply *Doe* was that *Doe* "merely reiterated the well-established premise that an individual holding the documents of an artificial entity, whether a corporation, partnership or sole proprietorship, cannot assert a fifth amendment privilege" (App., *infra*, 10a). It is abundantly clear, however, that *Doe* did not treat the indi-

vidual whose business records were subpoenaed in that case as an "artificial entity." Nowhere in the Court's opinion is there a hint of a distinction between the records of a sole proprietorship and an individual's business records. On the contrary, the Court referred interchangeably to the records in *Doe* as "the business records of a sole proprietorship" (*United States* v. *Doe*, slip op. 1) and "his [*i.e.*, the respondent's] business records" (slip op. 11 & n.17). Moreover, the Court held that the act of producing the subpoenaed records in *Doe* was privileged even though this Court's cases firmly established that the custodian of the records of an "artificial entity" such as a corporation or partnership, may not resist a documentary subpoena on act-of-production grounds. See *Fisher*, 425 U.S. at 408, 413. If the Court had regarded the sole proprietorship as an "artificial entity," then the act of production would not have been privileged.

In any event, the court of appeals' description of a sole proprietorship as an "artifical entity" (App., *infra*, 10a) is flatly wrong, and its distinction between the business records of a sole proprietorship and an individual's business or financial records makes no sense. A sole proprietorship is not an artificial entity; it "has no legal existence apart from its owner." *In re Grand Jury Empanelled February 14, 1978*, 597 F.2d 851, 859 (3d Cir. 1979). "Sole proprietorship" is simply a term used to describe a business conducted by a person in his personal capacity rather than through a partnership or corporation. The assets and debts of the sole proprietorship are those of the individual owner and vice versa. The sole proprietorship dies with the owner. The sole proprietorship does not pay taxes or even file a separate tax return; instead, its income is taxable to the owner. A person who owns a sole proprietorship is under no obligation to separate records relating directly to his business from any of his other financial records.

Nor is a person who owns several separate businesses that are run as sole proprietorships required to segregate the records of each. In such situations, all of the assets, liabilities, and documents reflecting them are regarded for virtually all legal purposes—*e.g.*, taxes, creditors' rights, inheritance, alimony and child support—as those of the individual.

Even where the individual segregates the records of his businesses, as may be true in this case, it makes no sense to distinguish between the records of a sole proprietorship and the business or financial records of the individual. For example, documents showing income received by the individual necessarily show income on which the "sole proprietor" may draw. Likewise, records memorializing the individual's debts necessarily reflect the "sole proprietor's" liabilities. And finally, assuming (as the government suspects) that respondent earns his income from illicit drug transactions and invests the proceeds in, for example, real estate, then he is as much a "sole proprietor" of drug and real estate ventures as the respondent in *Doe* was of his businesses. The distinction sought to be drawn by the court of appeals is thus wholly without substance.

3. Under the logic of *Fisher* and *Doe*, the Fifth Amendment privilege does not protect the contents of any voluntarily prepared documents, whether business-related or purely personal. In our view, any special protection available when purely personal documents, such as a diary, are subpoenaed must find its origin in another constitutional provision, such as the First or Fourth Amendments.[2] In this case, however, that question need not be addressed, because here, as in *Fisher* and *Doe*, only business and financial records are

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[2] For example, as a matter of Fourth Amendment law, it may be appropriate to require an exceptionally high showing of need before government officials may reasonably be permitted to examine the contents of a diary.

sought. The documents at issue—vouchers, bills, checks, etc.—are not of an intimate nature. See *United States* v. *Doe*, slip op. 2 (Marshall, J., dissenting); *Andresen*, 427 U.S. at 486 (Brennan, J., dissenting).[3]

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[3] Indeed, as the district court observed (App., *infra*, 14a), many of the documents are duplicates of documents held by third parties, such as respondent's bank. Accordingly, respondent has no legitimate privacy expectation in the contents of those documents. As the Court explained in *United States* v. *Miller*, 425 U.S. 435, 442-443 (1976), where it was argued that an individual had a legitimate expectation of privacy in records kept by his bank:

> Even if we direct our attention to the original checks and deposit slips, rather than to the microfilm copies actually viewed and obtained by means of the subpoena, we perceive no legitimate "expectation of privacy" in their contents. The checks are not confidential communications but negotiable instruments to be used in commercial transactions. All of the documents obtained, including financial statements and deposit slips, contain only information voluntarily conveyed to the banks and exposed to their employees in the ordinary course of business.

Although *Miller* speaks only of bank records, its teaching applies with equal force to each of the categories of documents at issue in this case. The documents subpoenaed are records of commercial transactions that by their nature require disclosure to third parties, often total strangers. There is simply no reasonable expectation of privacy inherent in documents of this kind.

CONCLUSION

The petition for a writ of certiorari should be granted. The Court may wish to consider summary reversal.

Respectfully submitted.

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NOVEMBER 1984

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 84-1527

UNITED STATES OF AMERICA, APPELLANT,

v.

(UNDER SEAL), APPELLEE.

In re: John Doe No. 462

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA,
AT ALEXANDRIA
ALBERT V. BRYAN, JR., DISTRICT JUDGE (GJ 38-2)

Argued July 11, 1984
Decided September 24, 1984

Before PHILLIPS, MURNAGHAN and ERVIN, *Circuit Judges.*

PHILLIPS, *Circuit Judge:*

The United States appeals from the district court's order quashing, on fifth amendment grounds, a portion of a grand jury subpoena directing appellee to produce specified records and papers held by him in an individual capacity.[1] The district court, relying on *Boyd* v. *United States*, 116 U.S. 616 (1886), held that the fifth amendment prevented the government from subpoenaing incriminating personal documents, notwithstanding the fact that appellee was given immunity for the

[1] Our jurisdiction is based on 18 U.S.C. § 3731.

implicit "testimony" involved in the act of producing the documents. On this appeal, the government argues that the judgment of the district court should be reversed because, it contends, the fifth amendment does not protect an individual against the compelled disclosure of the *contents* of incriminatory documents or papers, no matter how personal or private they may be. Because we believe that the Supreme Court's decision in *Boyd* is contrary to the position urged by the government, we affirm the judgment of the district court.

I

In March 1984, on application of the assistant United States Attorney, the federal grand jury sitting in the Eastern District of Virginia issued a subpoena duces tecum to appellee, who is a target of the grand jury's investigation into certain alleged narcotics, tax and currency violations. The subpoena required appellee to produce specified "personal records" for the period extending from January 1, 1975 to the date of the subpoena's issuance. Included within the scope of the subpoena were "'records of purchases, trades, sales, receipts, gifts and distributions of controlled substances."[2] On April 10, 1984, appellee filed a motion to

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[2] Item J of the grand jury subpoena required appellee to produce records of sole proprietorships. Appellee did not assert a fifth amendment privilege as to these documents and fully complied with Item J. *Cf. United States* v. *Doe*, 52 U.S.L.W. 4296 (U.S. Feb. 28, 1984) (records of sole proprietorship not protected by fifth amendment). Appellee also turned over all corporate documents subpoenaed by the grand jury. The critical document-identifying text of the subpoena at issue in this case is as follows:

> I. Personal records of [appellee] for the period January 1, 1975 through present (unless a different period is specified elsewhere*):
>
> A. 1975 income tax returns
>
> B. Records of real estate transactons, including but not limited to:
>
> 1. Sales contracts/purchase agreements

quash that portion of the subpoena requiring him to produce documents held by him in an individual capac-

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2. Financial statements
3. Settlement sheets
4. Deeds
5. Deeds of trust
6. Mortgages/promissory notes

C. Bank records, savings and loan records, credit union records, including but not limited to:

1. Checking account statements, cancelled checks, deposit tickets, debit memos, credit memos
2. Savings accounts statements, withdrawal slips, deposit tickets, debit memos, credit memos, interest statements
3. Retained copies of cashier's checks, money orders, wire transfers
4. Certificates of deposit and money market certificates, statements of account

D. Records of loans received/made, including but not limited to:

1. Applicatons
2. Financial statements
3. Notes
4. Security agreements/collateral agreements
5. Repayment records
6. Interest statements

E. Records of brokerage accounts, including but not limited to:

1. Applications
2. Financial statements
3. Monthly/quarterly statements
4. Purchase orders, purchase confirmation slips
5. Sell orders, sales confirmation slips
6. Cash receipts
7. Receipts of securities delivered or received
8. Stocks
9. Dividend statements
10. Interest statements
11. Cpital gains losses statements

*F. Records of all gifts *ever* received or made in excess of $200.

*G. Records of all inheritances *ever* received

H. Records of purchases and sales of assets or expenditures in excess of $200, including but not limited to:

1. Payment records
2. Invoices, statements
3. Titles, lease agreements

ity. He argued, first, that the subpoena was overbroad, and irrelevant to the grand jury's investigation, and, second, that the compelled production of personal rec-

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4. Importation and duty records
5. Appraisals, certificates of authenticity
6. Contracts, purchase agreements, bills of sale
7. Insurance and annuity policies

I. Records of credit cards, including but not limited to:

1. Monthly statements
2. Charge receipts

J. Records of businesses (sole proprietorships), including but not limited to:

1. Cash disbursement records
2. Cash receipts records
3. Client/customer name, address and telephone records
4. Inventory records
5. Employment records, employees names and address records, Forms W-2, payroll records, payroll tax records and returns
6. Invoices
7. Receipts
8. Shipping and delivery records
9. Lease agreement
10. Bank records (see I.C.)
11. Loan records (see I.D.)
12. Records of purchases of business assets and business expenditures (see I.H.)
13. Credit card records (see I.I.)
14. Records of sales of business assets

K. Records of payments of legal fees, retainers and monies deposited with lawyers and/or law firms, including but not limited to records of: payees, addresses of payees, amounts and dates of payments.

L. Records of purchases, trades, sales, receipts, gifts and distributions of controlled substances as defined by Title 21, United States Code, Sections 811 and 812, for the period January 1, 1970 through the present, including but not limited to:

A. Documents reflecting the names, addresses and telphone [sic] numbers of customers, sellers, traders, suppliers, importers, distributers [sic], transporters, drivers, storers and all other persons and/or entities involved in the acquisition, transportation, storage, disposal, advertising, promotion, sale and gifts of controlled substances.

B. Documents reflecting expenses of acquisition, transportation, storage, disposal, advertising, promotion, sale and gifts of controlled substances.

ords violated his fifth amendment right not to incriminate himself.

Following a hearing on April 13, 1984, the district court granted the motion to quash "to the extent that the subpoena calls for the production of personal records of appellee."[3] The court directed counsel for appellee to submit for the court's *in camera* inspection a list of the documents that were asserted to be "personal." At the same time, at the government's request, the court granted appellee immunity for the act of producing the documents.[4]

After reviewing the submitted description, the district court concluded that the documents were "clearly personal," and therefore were protected by the fifth amendment. The court ordered the *in camera* submission sealed until further order of the court,[5] and the United States noticed an appeal from this order.[6]

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[3] The district court rejected appellee's contentions concerning the relevance and overbreadth of the subpoena. That finding is not challenged on appeal.

[4] The application of the United States was submitted pursuant to 18 U.S.C. §§ 6002 & 6003. the immunity order stated that 'the fact of [appellee's] compliance with the aforedescribed subpoena may not be used against [appellee] in any criminal case, except in a prosecution for perjury, false statements or failing to comply with this Court's ORDER OF IMMUNITY."

[5] The district court noted that "many of the documents consist of checks, vouchers or documents, the original or copies of which are in the hands of third parties." The court thought it "ironic" that the government could subpoena these documents from the relevant third parties, but held that no waiver of appellee's fifth amendment right occurred when the documents were released to those individuals. We agree.

[6] Appellee contends that the United States should have appealed from the earlier April 13 order and that its failure to do so resulted in the untimely filing of the notice of appeal. The April 13 order, however, did not determine which documents were "personal" but merely directed appellee to submit to the court a list of documents that were asserted to be personal. Not until the April 19 order did the government know whether *any*

II

The government contends that the district court should be reversed because the fifth amendment does not protect appellee from the subpoena of his personal documents. Specifically, the United States argues that no fifth amendment privilege attaches to the *contents* of pre-existing documents of any kind. Although the government admits that subpoenaed documents constitute "testimonial evidence," it contends that the fifth amendment does not come into play because the individual's voluntary choice, not governmental compulsion, results in the incriminating documentary "testimony." Since the incriminating testimony is not *itself* compelled, so the argument goes, there is no constitutional right that prevents its disclosure to the government, even though the disclosure is unquestionably the result of government compulsion.

In line with this view, the government contends that the fifth amendment places no limits on govrnmental intrusion into an individual's private affairs, other than a narrow proscription against the extortion of testimony. *Cf.* 8, Wigmore, *Evidence* § 2263 (McNaughton rev. 1961) (privilege "directed at the employment of legal process to extract from the person's own lips an admission of guilt"). An individual's "right to privacy" is thus left protected in a constitutional sense only by the conditional limits set by the fourth amendment.[7] Be-

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documents were to be considered privileged. We therefore hold that the April 19 order was the proper final order from which to appeal.

[7] The fourth amendment places few constraints on the government's subpoena power. Notably, there is no requirement that the government have "probable cause" before subpoenaing documents or any other items. *See Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 209 (1946). As to subpoenas, the fourth amendment guards primarily against too much indefiniteness or breadth of the subpoena and imposes a requirement

cause we believe that the government's argument is inconsistent with the long-standing holding of the Supreme Court, first enunciated in *Boyd*, we affirm the order of the district court quashing the subpoena on fifth amendment grounds.

Boyd v. *United States*, 116 U.S. 616 (1886), involved a forfeiture action brought by the United States against thirty-five cases of plate glass, allegedly imported without the payment of import duties. In the course of the action, the district court entered an order[8] requiring the claimants of the glass to produce an invoice from the exporter. The Supreme Court held that the district court's order, and the statute pursuant to which it was entered, violated both the fourth and fifth amendments. Noting that the district court's order went even further than "the Act under which the obnoxious writs of assistance were issued," *id.* at 623, the Court first held that "a compulsory production of a man's private papers to establish a criminal charge against him" *id.* at 622, violates the fourth amendment's proscription against

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that the subpoenaed items be relevant. *See id.; United States* v. *Dionisio*, 410 U.S. 1 (1973). The Supreme Court has also rejected the contention that a subpoena to obtain records should be subject to more stringent fourth amendment requirements than other items: "A subpoena *duces tecum* issued to obtain records is subject to no more stringent fourth amendment requirements than is the ordinary subpoena." *United States* v. *Miller*, 425 U.S. 435, 446 n.8 (1976) (business records of bank).

The substantive limits placed on government by the due process clause also unconditionally protect, in a few instances, the privacy of the individual. *See, e.g., Griswold* v. *Connecticut*, 381 U.S. 479 (1965).

[8] The statute pursuant to which the order was entered provided that the failure of the individual to produce the records designated by the government's motion resulted in the allegations stated in the motion being taken as true. *See Boyd*, 116 U.S. at 619-20.

unreasonable searches and seizures.[9] Observing that both the fourth and fifth amendments protect an individual's right to privacy, the Court declared that the prohibition against the forced production of private papers involves "the very essence of constitutional liberty and security."

> It is not the breaking of his doors and the rummaging of his drawers that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where the right has never been forfeited by his conviction of some public offense; it is the invasion of this sacred right which underlies and constitutes the essence of *Lord* Camden's judgment. Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime . . . is within the condemnation of that judgment. In this regard the Fourth and Fifth Amendments run almost into each other.

Id. at 630.

A contrary reading of the Constitution, *Boyd* noted, might "suit the purposes of despotic power," but it conflicts with "the pure atmosphere of political liberty and personal freedom" enjoyed in this country. *Id.* at 632. The Court was "unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling

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[9] In an effort to distinguish the unreasonable search at issue in *Boyd* from searches for contraband, which the common law regarded as "reasonable," the Court noted that in the latter situation the government possessed a superior property right in the items searched for. In *Warden* v. *Hayden*, 387 U.S. 294 (1967), the Supreme Court rejected the notion that the reasonableness of a search depended upon whether the items sought were "mere evidence" of a crime, or constituted "fruits and instrumentalities" of the crime.

him to be a witness against himself." *Id.* at 633. As a consequence, *Boyd* explicitly held that "a compulsory production of the private books and papers of the owner of the goods sought to be forfeited in such a suit is compelling him to be a witness against himself, within the meaning of the Fifth Amendment to the Constitution."[10] *Id.* at 634-35.

Later Supreme Court decisions have reaffirmed *Boyd*'s essential holding. *See, e.g., Bellis* v. *United States*, 417 U.S. 85, 87 (1974) ("the Fifth Amendment privilege against compulsory self-incrimination protects an individual from compelled production of his personal papers and effects as well as compelled oral testimony"); *United States* v. *Calandra*, 414 U.S. 338, 346 (1974) ("grand jury may not compel a person to produce books and papers that would incriminate him"); *United States* v. *Dionisio*, 410 U.S. 1, 11 (1973) (grand jury "cannot require the production by a person of private books and records that would incriminate him");[11]

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[10] The "owner" of the document subpoenaed in *Boyd* was a partnership, E.A. Boyd & Sons. In *Bellis* v. *United States*, 417 U.S. 85 (1974), the Supreme Court held that the fifth amendment does not protect the financial records of a partnership. In *Bellis*, however, the Court distinguished *Boyd*, noting that "we do not believe that the Court in *Boyd* can be said to have decided the issue presented today." *See id.* at 95 n.2. As *Bellis* noted, *Boyd* was decided on "the premise that it involved the 'compulsory producton of a man's private papers.'" *Id.* (quoting *Boyd*, 116 U.S. at 622).

[11] The minimal fourth amendment constraints placed on the government's subpoena power, *see supra* note 7, have always been assessed in conjunction with the fifth amendment's traditional protection of the individual's private papers. In *Dionisio*, for instance, the Supreme Court rejected a fourth amendment challenge to a grand jury subpoena, but noted that the fifth amendment prevented the government from requiring a person to produce incriminating private books and records. *See* 410 U.S. at 11.

Under the view advocated by the government in this case, a grand jury could subpoena an individual's personal diary on the

Schmerber v. *California*, 384 U.S. 757, 763-64 (1966) (fifth amendment reaches "compulsion of responses which are also communications, for example, compliance with a subpoena to produce one's papers"); *United States* v. *White*, 322 U.S. 694, 699 (1944) (privilege "protects the individual from any disclosure, in the form of ... documents, sought by legal process against him as a witness").

No later decision of the Supreme Court has held to the contrary on the point directly in issue. The government here relies on dicta in several recent decisions of the Court to support its view. The dicta are assuredly there, but none of these decisions has overruled *Boyd*.

The Supreme Court's decision in *Fisher* v. *United States*, 425 U.S. 391 (1976), which the government contends resulted in the "peaceful interment" of *Boyd*, involved a subpoena issued to a third party for the production of business records which were not written by the proponent of the privilege. The *Fisher* Court took pains to distinguish *Boyd*, and explicitly reserved judgment on the question presented here—whether the compelled production of the proponent's own papers would violate the Constitution. *See* 425 U.S. at 414. Other cases relied upon by the government merely reiterated the well-established premise that an individual holding the documents of an artificial entity, whether a corporation, partnership or sole proprietorship, cannot assert a fifth amendment privilege. *See United States* v. *Doe*, 52 U.S.L.W. 4296 (U.S. Feb. 28, 1984) (sole proprietorship); *United States* v. *Fishman*, 726 F.2d 125 (4th Cir. 1983) (sole proprietorship). *See also Andresen* v. *Maryland*, 427 U.S. 463 (1976) (search for

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bare ground that it was in some way "relevant" to a broad-based investigation being conducted by the grand jury. If this were allowed, a grand jury subopena would indeed have become a "talisman that dissolves all constitutional protections." *Dionisio*, 410 U.S. at 11.

business records of law office does not violate fifth amendment).

III

Among other things, the fifth amendment evinces "our respect for the inviolability of the human personality and of the right of each individual 'to a private enclave where he may lead a private life.'" *Murphy* v. *Waterfront Commission*, 378 U.S. 52, 55 (1964) (quoting *United States* v. *Grunewald*, 233 F.2d 556, 581-82 (Frank, J., dissenting), *rev'd*, 353 U.S. 391 (1957)). *See also Bellis*, 417 U.S. at 91-92; *Couch* v. *United States*, 409 U.S. at 327. The fundamental teaching of *Boyd* is consistent with this purpose: the forced disclosure of private incriminating information jeopardizes the individual's right to keep at least that aspect of himself which is reflected in his private papers free from the intrusive hands of the government.[12] Implicit in the cherished right of the individual to "pursue happiness" is the concomitant right to express one's own thoughts free from the government's exaction of those thoughts

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[12] The government has also argued, in the alternative, that the documents subpoenaed here are not sufficiently "private" to merit the protection of the fifth amendment. Private financial and commercial records, it contends, should not be privileged, even if intimate personal papers are found to be.

We decline, however, to engage in a case-by-case content-based determination of the privacy interest attendant to a given document. The proper line, we feel, has been drawn—whether the documents are held in an individual or representative capacity. Documents held in a representative capacity clearly reflect no privacy expectation on the part of the representative. *See Bellis*, 417 U.S. at 91-92 (unlike personal records, "a substantial claim of privacy or confidentiality cannot often be maintained with respect to the financial records of an organized collective entity"). *See also United States* v. *Davis*, 636 F.2d at 1043 (refusing to alter fifth amendment protection depending on whether documents are "business-related or more inherently personal in content"). *Cf. Boyd* (fifth amendment protects against production of invoice).

upon penalty of one's liberty. We therefore hold, in line with *Boyd*, that the fifth amendment prevents the government from subpoenaing an individual's incriminating papers that are in his possession and are held by him in an individual, as opposed to representative capacity. *Accord United States* v. *Davis*, 636 F.2d 1028, 1043 (5th Cir.), *cert. denied*, 454 U.S. 862 (1981); *In re Grand Jury Proceedings*, 632 F.2d 1033, 1044 (3d Cir. 1980). *See also United States* v. *Helina*, 549 F.2d 713 (9th Cir. 1977). *But see In re Grand Jury Proceedings*, 626 F.2d 1051 (1st Cir. 1980) (no protection for personal business records); *United States* v. *Schlansky*, 709 F.2d 1079, 1083 (6th Cir. 1983) (no fifth amendment protection against disclosure of contents of documents "less private" than personal diary), *cert. denied*, 104 S. Ct. 1591 (1984). Since the documents at issue in this case were held by appellee in his individual capacity, the district court's order quashing the subpoena in part is affirmed.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA ALEXANDRIA DIVISION

IN RE:

GRAND JURY NO. 83-2
JOHN DOE NO. 462

MEMORANDUM OPINION AND ORDER

On April 16, 1984, this court sustained the motion of [John Doe No. 462] to quash that part of a grand jury subpoena which required him to produce his personal, as opposed to his business, records.[1] To enable the court to determine whether the records claimed to be were in fact personal, a listing and description of those recrods were directed to be submitted for in camera review by the court. This has now been accomplished.

An inspection of the list and description reveals the documents clearly to be personal, including copies of [Doe's] tax return.[2] Consequently they need not be produced.

Ironically many of the documents consist of checks, vouchers or documents, the original or copies of which

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[1] At argument the government relied on *United States* v. *John Doe*, 52 U.S.L.W. 4296 (February 28, 1984). While that case concerned only business records, the logical extension of its rationale, as Justice O'Connor points out in her concurring opinion, is to exempt private papers from Fifth Amendment protection. Neither the Supreme Court nor the Fourth Circuit has as yet done that, nor has *Boyd* v. *United States*, 116 U.S. 616 (1886), been expressly overruled, although it has been discredited insofar as business records are concerned. Until it is overruled this court feels obliged to follow it.

[2] Whether the Fifth Amendment is a shield protecting the production of personal tax records was an issue expressly left open in *Fisher* v. *United States*, 425 U.S. 391, 414 (1976).

are in the hands of third parties. These probably could be obtained from the third parties by a grand jury subpoena if the government knew their whereabouts or custodian. That issue is not before the court, however, and the court is not prepared to say that because copies of the private papers are in the hands of others this constitutes a waiver of [Doe's] Fifth Amendment privilege.

The in camera submission shall be sealed until further order of this or a reviewing court.

And it is so ordered.

/s/ [Albert V. Bryan, Jr.]

United States District Judge

Alexandria, Virginia
APRIL 19TH, 1984

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

IN RE:

GRAND JURY 83-4
[JOHN DOE NO. 462]

ORDER

Upon consideration of the motion of [John Doe] to quash the grand jury subpoena and for a protective order, it is hereby ORDERED that:

1. The motion to quash is granted to the extent that the subpoena calls for the production of personal records of [John Doe]. In all other respects the motion to quash is denied.

2. Counsel for [John Doe] promptly shall forward to the court for an in camera inspection a listing of those documents which are asserted to be personal records, with sufficient identification of such document to enable the court to make a determination whether it is a personal or business record.

3. The motion of [John Doe] for a protective order is denied.

/s/ [Albert V. Bryan, Jr.]
United States District Judge

Alexandria, Virginia
APRIL 13TH, 1984

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 84-1527

UNITED STATES OF AMERICA, APPELLANT

v.

(UNDER SEAL)
JOHN DOE NO. 462, APPELLEE

[Filed Sept. 24, 1984]

JUDGMENT

Appeal from the United States District Court for the Eastern District of Virginia.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Virginia, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

/s/ John M. Greacen
CLERK

APPENDIX E

UNITED STATES COURT
EASTERN DISTRICT OF VIRGINIA

U.S. v. John Doe 462
Grand Jury 83-2

SUBPOENA TO TESTIFY BEFORE GRAND JURY

To:

[John Doe],

Subpoena for:

☒ Person
☒ Document or Object

YOU ARE HEREBY COMMANDED to appear in the United States District Court at the location, date, and time specified below to testify before the Grand Jury in the above entitled case.

Place:

200 S. Washington Street
Alexandria, VA 22314

Courtroom:

Grand Jury Room

Date and Time:

April 17, 1984 9:30 a.m.

YOU ARE ALSO COMMANDED to bring with you the following document(s) or object(s):

See attached

This subpoena shall remain in effect until you are granted leave to depart by the court or by an officer acting on behalf of the court.

Clerk: W. FARLEY POWERS, JR. DATE: 3/22/84

This subpoena is issued on application of the United States of America by:

Karen P. Tandy
Assistant United States Attorney
701 Prince Street
Alexandria, VA 22314
703-557-9100

I. Personal records of [John Doe] and [Jane Doe] for the period January 1, 1975 through present (unless a different period is specified elsewhere*):

A. 1975 income tax returns

B. Records of real estate transactions, including but not limited to:

1. Sales contracts/purchase agreements
2. Financial statements
3. Settlement sheets
4. Deeds
5. Deeds of trust
6. Mortgates/promissory notes

C. Bank records, savings and loan records, credit union records, including but not limited to:

1. Checking account statements, cancelled checks, deposit tickets, debit memos, credit memos
2. Savings accounts statements, withdrawal slips, deposit tickets, debit memos, credit memos, interest statements
3. Retained copies of cashier's checks, money orders, wire transfers
4. Certificates of deposit and money market certificates, statements of account

D. Records of loans received/made, including but not limited to:

1. Applications
2. Financial statements
3. Notes
4. Security agreements/collateral agreements
5. Repayment records
6. Interest statements

E. Records of brokerage accounts, including but not limited to:

1. Applications
2. Financial statements

3. Monthly/quarterly statements
4. Purchase orders, purchase confirmation slips
5. Sell orders, sales confirmations slips
6. Cash receipts
7. Receipts of securities delivered or received
8. Stocks
9. Dividend statements
10. Interest statements
11. Capital gains losses statements

*F. Records of all gifts *ever* received or made in excess of $200

*G. Records of all inheritances *ever* received

H. Records of purchases and sales of assets or expenditures in excess of $200, incuding but not limited to:

1. Payment records
2. Invoices, statements
3. Titles, lease agreements
4. Importation and duty records
5. Appraisals, certificates of authenticity
6. Contracts, purchase agreements, bills of sale
7. Insurance and annuity policies

I. Records of credit cards, including but not limited to:

1. Monthly statements
2. Charge receipts

J. Records of business (sole proprietorships), including but not limited to:

1. Cash disbursement records
2. Cash receipts records
3. Client/customer name, address and telephone records
4. Inventory records
5. Employment records, employees names and address records, Forms W-2, payroll records, payroll tax records and returns

6. Invoices
7. Receipts
8. Shipping and delivery records
9. Lease agreement
10. Bank records (see I.C.)
11. Loan records (see I.D.)
12. Records of purchases of business assets and business expenditures (see I.H.)
13. Credit card records (see I.I.)
14. Records of sales of business assets

K. Records of payments of legal fees, retainers and monies deposited with lawyers and/or law firms, including but not limited to records of: payees, addresses of payees, amounts and dates of payments

II. Records of purchases, trades, sales, receipts, gifts and distributions of controlled substances as defined by Title 21, United States Code, Sections 811 and 812, for the period January 1, 1970 through the present, including but not limited to:

A. Documents reflecting the names, addresses and telephone numbers of customers, sellers, traders, suppliers, importers, distributors, transporters, drivers, storers and all other persons and/or entities involved in the acquisition, transportation, storage, disposal, advertising, promotion, sale and gifts of controlled substances.

B. Documents reflecting expenses of acquisiton, transportation, storage, disposal, advertising, promotion, sale and gifts of controlled substances.

Supreme Court, U.S.
FILED
DEC 26 1984
ALEXANDER L. STEVAS
CLERK

No. 84-823

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES OF AMERICA,

Petitioner,

v.

JOHN DOE NO. 462,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION FOR RESPONDENT

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BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the Fifth Amendment privilege against self-incrimination continues to protect an individual from the compelled disclosure of his personal documents.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-823

UNITED STATES OF AMERICA,

Petitioner,

v.

JOHN DOE NO. 462,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF IN OPPOSITION FOR RESPONDENT

Respondent respectfully submits this brief in opposition to the government's petition for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is not yet reported. The opinion of the district court (Pet. App. B) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. D) was entered on September 24, 1984. The petition for a writ of certiorari was filed on November 21, 1984. The government invokes the jurisdiction of this Court under 28 U.S.C. 1254 (1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment provides in pertinent part:

> No person . . . shall be compelled in any criminal case to be a witness against himself . . .

STATEMENT

On March 21 and 22, 1984, a federal grand jury sitting in the Eastern District of Virginia issued three subpoenas *duces tecum* to respondent. Two of the subpoenas sought business records and were issued to the respondent in his capacity as the president of two wholly owned corporations. The third subpoena was issued to respondent in his individual capacity and explicitly called for the production of respondent's personal records, as well as the business records of respondent's sole proprietorship. *See* C.A. App. 3-6F; Pet. App. E.

On April 10, 1984, respondent moved to quash that portion of the subpoena *duces tecum* served on him as an individual calling for the production of his personal records on the ground that such production would violate his Fifth Amendment privilege against self-incrimination. *See* C.A. App. 7-8; Pet. App. 2a - 5a.

On April 13, 1984, the United States District Court for the Eastern District of Virginia granted respondent's motion to quash to the extent that the subpoena called for the production of respondent's personal records. The district court also directed respondent's counsel to submit *in cam-*

era a detailed "listing of those documents which are asserted to be personal records, with sufficient identification of such document to enable the court to make a determination whether it is a personal or business record." *See* Pet. App. C. In addition, the district court, on the government's motion pursuant to 18 U.S.C. §§ 6002 and 6003, ordered that immunity be granted to respondent for the act of production and identification before the grand jury of the records called for in the subpoena. The immunity order did not extend so as to protect respondent from any incriminatory aspects of the contents of the personal documents. *See* C.A. App. 53-55, 57-58; Pet. App. 5a, 15a.

On April 19, 1984, following the *in camera* inspection of respondent's list of personal documents, the district court found that all of the listed documents were "clearly . . . personal" and, in accordance with its April 13 order regarding the Fifth Amendment privilege, ruled that respondent need not produce them to the grand jury. *See* Pet App. B. Accordingly, on April 19, 1984, respondent produced and identified for the grand jury all of the subpoenaed corporate and sole proprietorship business records while retaining possession only of the specific documents which the district court found to be "clearly personal".

The court of appeals affirmed the trial court's ruling and held "that the fifth amendment prevents the government from subpoenaing an individual's incriminating papers that are in his possession and are held by him in an individual, as opposed to representative capacity." *See* Pet. App. 12a.[1]

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[1]At the time respondent's Brief In Opposition went to print, proceedings were pending in the district court which may materially affect the state of the record in this case. The district court has scheduled an evidentiary hearing to determine whether the govern-

REASONS FOR DENYING THE PETITION

Petitioner contends (Pet. at 5-6) that this case presents an important and recurring question because "financial records of individuals are often of great value in detecting and investigating crime and are therefore subpoenaed frequently." This statement contains two inaccuracies. First, as discussed *infra*, this case involves *personal* records, not "financial records" nor "business records" as petitioner would prefer to describe them. Second, petitioner provides no support for its assertion that such records are subpoenaed frequently nor does it suggest that prosecutors have had any difficulty respecting the *Boyd* limitation[2] on their grand jury subpoena power. Therefore, the question presented in this case is not a recurring one. Petitioner's result-oriented justification for seeking certiorari—that personal records are of "great value in detecting and investigating crime" such that summary reversal of the court of appeals is warranted—simply glosses over the fact that the government is attempting to expand its subpoena power into an area heretofore untouched by such intrusion.

Contrary to petitioner's assertion (Pet. at 5), the court of appeals decision in this case is not "in conflict with applicable decisions of this Court." *See* Supreme Court Rule 17.1(c).

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ment gained access to certain attorney client privileged documents, in violation of the court's order, and disclosed such documents to the grand jury. Among other things, this inquiry will include a determination of whether the detailed listing of respondent's personal documents which the district court requested on April 13, *see* accompanying text, was also obtained by the government. The district court's rulings on this matter, including the possible imposition of sanctions against the government, could materially affect the state of the record. Indeed, the question of whether the government may obtain respondent's personal records may be moot.

[2]*See Boyd* v. *United States*, 116 U.S. 616 (1886) discussed *infra*.

The Fifth Amendment protection for personal papers is well settled. Indeed, it is petitioner who attempts to create a conflict by asking this Court to expressly overrule *Boyd*, as well as disavow all statements supporting *Boyd* in its more recent decisions.

1. Throughout its petition, the government repeatedly refers to the records at issue here as "business and financial records" (Pet. at 5, 6, 9, 11, 12, 13). As explained *supra*, all corporate and sole proprietorship documents have been produced for the grand jury. A review of the record reveals that the only remaining undisclosed documents are clearly "personal records." First, the subpoena explicitly calls for the production of the "personal records of [John Doe]." Pet. App. 18a, ¶ I. Second, after reviewing the *in camera* list of documents covered by the subpoena, the district court found the documents at issue to be "clearly personal." Pet. App. B at 13a. Finally, the court of appeals did not disturb the lower court's finding, nor did the government even argue below that the documents were not personal.[3] Pet. App. A at 2a. That factual finding, having been decided in the courts below adversely to petitioner's contention here, does not merit review by this Court. *Berenyi v. Immigration Director*, 385 U.S. 630, 637 (1967).

2. The availability of the Fifth Amendment privilege to grand jury witnesses was recognized by this Court in *Counselman v. Hitchcock*, 142 U.S. 547 (1892) and has been

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[3]In this regard, petitioner erroneously states (Pet. at 6) that "the court of appeals held that the Fifth Amendment privilege protects the contents of voluntarily prepared business records." However, a careful reading of the court of appeals opinion clearly reveals that "personal or private" documents are at issue in this case and formed the basis of the court of appeals holding. *See* Pet. App. A at 2a, 11a-12a.

reaffirmed in more recent cases. *See, e.g., United States v. Mandujano*, 425 U.S. 564, 572-73 (1976).

3. Contrary to petitioner's assertion (Pet. at 5), the judgment issued by the court of appeals in the case *sub judice* is not in conflict with the applicable decisions of this Court. For nearly a century, the decisions of this Court have strictly adhered to and reaffirmed the constitutional principle that the compelled production of an individual's private papers within his possession through the issuance of a subpoena *duces tecum* constitutes a violation of the Fifth Amendment privilege against self-incrimination. In the landmark case of *Boyd v. United States*, 116 U.S. 616 (1886), this Court unanimously acknowledged that the privacy interests protected by the Fifth Amendment extend beyond the mere delivery of oral testimony and accordingly held that the "compulsory production of . . . private books and papers . . . is [tantamount to] compelling [an individual] . . . to be a witness against himself . . ." *Id.* at 634-35. In *Boyd*, the government obtained an order from the district court requiring the petitioners to produce an invoice which reflected that they had failed to pay certain duties while importing plate glass. This Court ruled that the district court's order compelling petitioners to produce such a document constituted a violation of both the Fourth and Fifth Amendments.[4]

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[4]Relying on the English case of *Entick* v. *Carrington*, 19 How. St. Tr. 1029, 1066 (1765) in which Lord Camden asserted that "papers are the owner's . . . dearest property," Justice Bradley explained the "intimate relationship" between the Fourth and Fifth Amendment and stated:

> They throw great light on each other. For the "unreasonable searches and seizures" condemned in the fourth amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned

In reaching its decision, this Court underscored the sanctity of an individual's right to privacy and explained:

> It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property . . . . Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony, or of his private papers to be used as evidence to convict him of crime . . . is within the condemnation of that judgment.

Id. at 630.

On numerous occasions since *Boyd*, this Court has reaffirmed *Boyd's* principal holding that the privacy protected by the Fifth Amendment extends to shield an individual from the compulsory production of his private papers. *See, e.g., Bellis v. United States*, 417 U.S. 85, 87 (1974) ("[i]t has long been established . . . that the Fifth Amendment privilege against compulsory self-incrimination protects an individual from compelled production of his personal papers . . . "); *United States v. Dionisio*, 410 U.S. 1, 11 (1973) (grand jury "cannot require the production by a person of private books and records that would incriminate him"); *Gilbert v. California*, 388 U.S. 263, 266-67 (1967) ("[a] mere handwriting exemplar, in contrast to the content of what is written . . . is . . . outside [the] protection" of the Fifth Amendment); *Schmerber v. California*, 384 U.S. 757,

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> in the fifth amendment; and compelling a man "in a criminal case to be a witness against himself," . . ., throws light on the question as to what is an "unreasonable search and seizure" within the meaning of the fourth amendment.

116 U.S. at 633.

763-64 (1966) (the Fifth Amendment reaches only compulsion of "an accused's communications . . . for example, compliance with a subpoena to produce one's papers"); *United States v. White*, 322 U.S. 694, 701 (1944) ("the privilege against self-incrimination . . . protect[s] . . . the natural individual from compulsory incrimination through his own testimony or personal records"); *Sinclair v. United States*, 279 U.S. 263, 292-93 (1929) *quoting In Re Pacific Ry Comm'n*, 32 F. 241, 250 (C.C.N.D. Cal. 1887) (" '[o]f all the rights of the citizen, few are of greater importance or more essential . . . than the right of personal security, and that involves . . . exemption of his private affairs, books, and papers from the inspection and scrutiny of others.' "); *Wilson v. United States*, 221 U.S. 361, 377 (1911) (Fifth Amendment "[u]ndoubtedly . . . protected [the president] against the compulsory production of his private books and papers"); *I.C.C. v. Baird*, 194 U.S. 25, 45 (1904) ("the . . . Fifth Amendment[] . . . protect[s] a citizen from compulsory testimony against himself which may result in . . . the seizure of his papers by force, or their compulsory production . . ").

Despite these decisions, the petitioner relies on dicta from *Fisher v. United States*, 425 U.S. 391 (1976) and *United States v. Doe*, 104 S. Ct. 1237 (1984), two cases in which this Court considered the application of the Fifth Amendment to business records, to argue that *Boyd* has been overruled so that personal papers no longer enjoy any protection under the Fifth Amendment (Pet. at 8-9). Although it is undisputed that there has been a general demise of the Fifth Amendment privilege as applied to business records, *see Hale v. Henkel* 201 U.S. 43 (1906); *Grant v. United States* 227 U.S. 74 (1913); *United States v. White; Couch v. United States*, 409 U.S. 322 (1973); *Bellis v. United States; Fisher v. United States; United States v. Doe*, this Court has painstakingly distinguished cases calling for the

compulsory production of business records, from situations in which the government has subpoenaed an individual's private papers. *See Hale v. Henkel*, 201 U.S. at 74 ("we are of the opinion that there is a clear distinction . . . between an individual and a corporation, and that the latter has no right to refuse to submit its books and papers for an examination at the suit of the state"); *Grant v. United States*, 227 U.S. at 80 ("[t]he books and papers called for by the subpoena were corporate records and documents"); *United States v. White*, 322 U.S. at 704 ("[n]o valid claim was made that any part of [the subpoenaed documents] constituted his own private papers"); *Bellis v. United States*, 417 U.S. at 89-90 *quoting United States v. White*, 322 U.S. at 701 ("the privilege against compulsory self-incrimination . . . 'protect[s] only the natural individual from compulsory incrimination through his own testimony or personal records' ").

More recently, in *Fisher*, this Court considered the question of whether a taxpayer's Fifth Amendment privilege precluded enforcement of an Internal Revenue Service summons directing an attorney to produce business papers which had been prepared by an accountant and delivered to the attorney by the taxpayer. In holding there was no constitutional violation in the production of the business records, this Court was careful to note that "[s]pecial problems of privacy which might be presented by [a] subpoena of a personal diary are not involved here," and that it had not addressed the question of "[w]hether the Fifth Amendment would shield the taxpayer from producing his own tax records in his possession . . . [since] the papers demanded here are not his 'private papers . . . .' " *Fisher v. United States*, 425 U.S. at 401 n.7 (citation omitted), 414. Similarly in *Doe*, where this Court ruled that an individual could be compelled to disclose the business records of his sole proprietorship, Justice Marshall explained that the Court had

not "reconsidered whether the Fifth Amendment provides protection for the contents of 'private papers of any kind.'" 104 S. Ct. at 1245 (Marshall J., concurring).

Consequently, contrary to petitioner's assertions, no cases of this Court, including those restricting the application of the Fifth Amendment to business records, have overruled *Boyd* nor held that the privilege against self-incrimination no longer protects the contents of an individual's personal papers when disclosure is compelled by the government. Instead, in each instance in which this Court has limited the protection to be afforded business records, this Court has exempted personal papers from its holding and suggested the continued vitality of the Fifth Amendment protection provided personal papers.[5]

4. The reservation of a Fifth Amendment protection for personal papers is wholly consistent with this Court's state-

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[5]Petitioner also relies on the case of *Andresen* v. *Maryland*, 427 U.S. 463 (1976), in which this Court held that the Fifth Amendment privilege does not protect an individual from the seizure of business records pursuant to a valid search warrant, to argue that the privilege against self-incrimination should no longer shield a citizen from a disclosure of his personal papers pursuant to a subpoena *duces tecum*. In *Andresen*, however, this Court repeatedly underscored the fact that the documents at issue were "business records" and limited its holding by stating, "[t]his case presents the issue whether the introduction into evidence of a person's business records, seized during a search of his offices, violates the Fifth Amendment . . . ." *Id.* at 465. Moreover, Justice Blackman noted that since the seizure in *Andresen* was pursuant to a search warrant and thus the "petitioner was not asked to say or to do anything," the requirement of testimonial compulsion necessary to trigger the invocation of the Fifth Amendment was missing. *Id.* at 473. In *Andresen*, again recognizing the narrowness of its holding, the Court noted that "the Fifth Amendment may protect an individual from complying with a subpoena for the production of his personal records in his possession . . . ." *Id.* at 473-74.

ments that the Fifth Amendment be construed to safeguard an individual's privacy interests. *See Bellis v. United States*, 417 U.S. at 91 (Fifth Amendment protects an "inner sanctum which necessarily includes an individual's papers . . ."); *Couch v. United States*, 409 U.S. at 327 (Fifth Amendment "respects a private inner sanctum of individual feeling and thought and proscribes state intrusion to extract self-condemnation"); *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) ("[s]elf [i]ncrimination [c]lause enables the citizen to create a zone of privacy which [the] government may not force him to surrender to his detriment"); *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 55 (1964) *quoting United States v. Grunewald*, 233 F.2d 556, 581-82 (2d Cir. 1956) (Frank J., dissenting) *rev'd* 353 U.S. 391 (1957) (Fifth Amendment reflects "our respect for the inviolability of the human personality and of the right of each individual 'to a private enclave where he may lead a private life' ").

Recognizing that the protection of one's ability to develop ideas free from governmental intrusion and the fear of self-incrimination is one of the fundamental purposes of the Amendment, it is only logical that the self-incrimination clause be applied so as to shield an individual from the compelled production of private writings since such documents are mere extensions of the thought process. *See Fisher v. United States*, 425 U.S. at 420 (Brennan J., concurring). If this Court were to eradicate all protection for private papers, so as to allow the government to compel an individual to produce a personal private writing, then "[t]he ability to think private thoughts, facilitated as it is by pen and paper, and the ability to preserve intimate memories would be curtailed through fear that those thoughts or events of those memories would become the subjects of criminal sanctions . . . ." *Id.* Just as this Court has recognized that an individual's "fantasies . . . are his own and

beyond the reach of government," so too are his personal writings regarding his thoughts and private actions. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 67 (1973). If the Fifth Amendment proscribes the government from compelling an individual to disclose the contents of his thought, then it must likewise proscribe compelling an individual to disclose papers on which he has worded those private ideas. *See Boyd v. United States*, 116 U.S. at 633.[6]

In the case *sub judice*, the subpoena *duces tecum*, calling for the production of respondent's personal records, is tantamount to the classic situation of the government's attempting to subpoena an individual's private diary. More specifically, the government seeks to subpoena "[r]ecords of purchases, trades, sales, receipts, gifts and distribution of controlled substances," including a virtual diary of all persons with whom respondent may have dealt with regard to controlled substances,and all expenses related thereto (Pet. App. at 20a). Since these records represent nothing more than a personal log of alleged transactions, it is difficult to perceive how they differ in any significant respect from a personal diary containing the words "I sold drugs to X today." Consequently, this case should be analyzed as one

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[6]The petitioner also argues (Pet. at 12-13) that the analysis applied to business records in *Fisher* and *Doe* be extended so as to eliminate all protection for personal records. Specifically, in *Fisher* and *Doe*, this Court refused to protect the contents of business records from compulsory production unless the creation of the document was actually compelled. *See Fisher* v. *United States*, 425 U.S. at 410 n.11 and *United States* v. *Doe*, 104 S.Ct. at 1241. To apply such an analysis to personal papers, however, would not only eradicate any and all Fifth Amendment protection for personal writings, since there would rarely if ever be an occasion where someone is compelled to keep a diary of his private life, but in so doing would violate this Court's own mandate that the Fifth Amendment be construed to protect privacy interests.

wherein the government has sought the most private, personal papers of an individual through the compulsion of a subpoena.[7]

Petitioner also argues (Pet. at 11-12) that *Doe* and *Fisher* should be read to overrule *Boyd*, since it is inherently inconsistent to treat personal papers any differently from business records. This Court, however, has acknowledged and explicitly held that the very nature of the item at issue may in fact determine the extent of the constitutional protection it is entitled to receive. For example, in the First Amendment context, this Court has already recognized that commercial speech is entitled to far less protection than other forms of speech. *See Metromedia Inc. v. City of San Diego*, 453 U.S. 490, 505 (1981); *Ohralik Inc. v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978); *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 779-80 (1976). As this Court has explained:

> To require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech. Rather than subject the First Amendment

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[7]Petitioner's "suspicion" (Pet. at 12) that respondent is a "sole proprietor" of an illegal drug and real estate venture forms the basis for its disingenuous argument that all personal records are therefore transformed into sole proprietorship business records. If this logic were accepted, however, there would be no logical limit to its application. Anyone suspected of illegal conduct could, under petitioner's theory, be viewed as a sole proprietor engaged in the suspected illegal conduct as a business. The goverment would then subpoena the records of all grand jury targets without any regard for their personal nature. Petitioner's argument is simply an attempt to avoid the issue that is squarely presented here: that it is attempting to obtain personal records through the compulsion of a subpoena.

> to such a devitalization, we instead have afforded commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of noncommercial expression.

Ohralik v. Ohio State Bar Ass'n, 436 U.S. at 456. *See also Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 562-63 (1980) (citations omitted) ("[t]he Constitution . . . accords a lesser protection to commercial speech than to other constitutionally guaranteed expression [and thus] [t]he protection available for particular commercial expression turns on the nature both of the expression and of the governmental interests served by its regulation"); *Zurcher v. Stanford Daily*, 436 U.S. 547, 564 (1978), *quoting Roaden v. Kentucky*, 413 U.S. 496, 501 (1973) ("'[a] seizure reasonable as to one type of material in one setting may be unreasonable in a different setting or with respect to another kind of material'").

The disparate First Amendment protection afforded commercial and noncommercial speech is analogous to the disparate Fifth Amendment protection this Court has provided to business and personal records. There is nothing inherently inconsistent in this Court's long standing policy of extending a greater degree of protection to personal papers than to business records.

5. Petitioner offers no cogent policy reason for departing from the long-standing protection afforded personal records. Petitioner's assertion (Pet. at 5) that such records are of "great value in detecting and investigating crime" is beside the point; the same could be said of a compelled confession. In neither of these situations should the result dictate the application and the extent of the constitutional

protection. Indeed, to accept petitioner's Fifth Amendment argument would lead to a demise in the adversarial system of justice which has heretofore required the government to prove its case without compelling a suspect to reveal his personal thoughts, whether spoken or written.

Petitioner does not suggest that law enforcement agencies are unable to function effectively due to an inability to compel a suspect to produce his personal papers. Petitioner flatly asserts (Pet. at 5-6) that personal records are "subpoenaed frequently" and that the issue presented in this case is a recurring one, but offers no support for this claim.[8]

The long-standing Fifth Amendment protection afforded private papers properly reflects a public policy recognizing the privacy interests involved. The government presents no public policy argument suggesting why this protection should now be abandoned. Accordingly, the Fifth Amendment protection should continue to apply to the personal documents at issue here.

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[8]While contending that the issue presented here is a "recurring one," petitioner significantly omits any citation to court of appeals' decisions that either support petitioner's Fifth Amendment argument regarding personal papers, or suggest that the issue is a recurring one. Similarly, petitioner does not contend that the decision of the Court of Appeals for the Fourth Circuit in the case *sub judice* is in "conflict with the decision of another federal court of appeals on the same matter." Supreme Court Rule 17.1(a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 84-823

In the Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES OF AMERICA, PETITIONER

v.

JOHN DOE NO. 462

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

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1. Respondent repeatedly contends (Br. in Opp. 4-5 (emphasis in original)) that "this case involves *personal* records, not 'financial records' nor 'business records' as petitioner would prefer to describe them." Respondent's assertion is highly misleading. To be sure, the subpoena and the lower court opinions described the records as "personal." But all that this description meant was that they were not the records of any corporation, partnership, or identified sole proprietorship. The suggestion that the subpoenaed records are not "financial" or "business" documents is flatly wrong, as a brief examination of the subpoena (Pet. App. 18a-20a) will reveal.

In the petition (at 12-13), we noted that the documents at issue in this case are not of an intimate, personal nature. In an effort to suggest otherwise, respondent tries (Br. in Opp. 12) to pass off the records of illegal drug deals as

"tantamount" to a "private diary." We do not believe that the Fifth Amendment privilege shields the contents of any voluntarily prepared documents (see Pet. 12-13); that the Fifth Amendment testimonial privilage does not independently safeguard privacy interests seems to us the logically inescapable conclusion from the settled principle that production may be compelled under a grant of appropriate immunity. But in any event, we very much doubt that drug ledgers are what members of this Court had in mind in suggesting that the contents of some intimate documents may enjoy Fifth Amendment protection. See *United States* v. *Doe,* No. 82-786 (Feb. 28, 1984), slip op. 2 (Marshall, J., dissenting); *Andresen* v. *Maryland,* 427 U.S. 463, 486 (1976) (Brennan, J., dissenting).

2. In the petition (at 10-12), we argued that the court of appeals' distinction between the records of a sole proprietorship and an individual's business records is legally unsound and impracticable. Respondent maintains (Br. in Opp. 13-14) that this distinction is analogous to the distinction in First Amendment law between commercial and noncommercial speech. There are two glaring flaws in this comparison. First, the court of appeals in this case did not distinguish between commercial and noncommercial records, for there can be no doubt that the subpoenaed records are of a commercial or business nature (see Pet. App. 18a-20a). Second, while the First Amendment undoubtedly protects the contents of speech, the Fifth Amendment privilege merely protects against compelled testimonial self-incrimination.

3. Respondent incorrectly suggests (Br. in Opp. 3-4 n.1) that subsequent events have mooted this case or rendered it unsuitable for review.

In November 1984, a deputy district court clerk turned over to the Assistant United States Attorney a box of documents that were supposed to have been screened to

remove materials protected by the attorney-client privilege. By mistake, a few privileged documents were included. As soon as the prosecutor recognized the privileged nature of these documents, she returned them to the court. Although there was no showing that these documents had been used against respondent in any way, the district court disqualified the Assistant United States Attorney and the case agents. The government appealed, and a judge of the Fourth Circuit stayed the order of disqualification. *United States* v. *John Doe No. 462,* No. 85-1001 (4th Cir. Jan. 2, 1985) (Wilkinson, J.).

These events have no bearing on the present case. The government has no intention of terminating the continuing investigation of respondent even if the disqualification order is affirmed.[1] Respondent notes that one of the privileged documents viewed by the Assistant United States Attorney is the list of assertedly "personal records" prepared by respondent's attorney in accordance with the district court's direction of April 13, 1984 (see Pet. App. 5a). However, it certainly cannot be argued that this occurrence rendered this case moot, since the Assistant United States Attorney's brief viewing of the list is hardly the same as examining and making evidentiary use of the documents themselves. In any event, if we are right that the Fifth Amendment does not protect respondent from having to comply with the subpoena, then the viewing of the list would not prejudice respondent and is thus entirely immaterial here.

3. Finally, there is no merit to respondent's suggestion (Br. in Opp. 15 n.8) that review is inappropriate on the ground that the court of appeals' decision does not conflict

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[1]If the disqualification order had not been stayed, however, certain aspects of the grand jury investigation would have been irreparably impaired.

with decisions of any other circuit, since the court of appeals' decision is fundamentally inconsistent with this Court's view of the Fifth Amendment privilege in *Doe* and *Fisher* v. *United States,* 425 U.S. 391 (1976). In addition, it conflicts with those court of appeals decisions that have followed this Court's reasoning. See *United States* v. *Schlansky,* 709 F.2d 1079, 1083 (6th Cir. 1983) (contents of cancelled checks, bank statements, invoices, and receipts not privileged because privilege does not protect contents of "personal papers" that are "less private" than a diary); *United States* v. *Doe,* 628 F.2d 694, 695 (1st Cir. 1980) (privilege does not protect contents of accountant's "personal business records"); *In re Grand Jury Proceedings,* 626 F.2d 1051, 1052 (1st Cir. 1980) (privilege does not protect doctor's "personal business records"). Indeed, the court of appeals in this case acknowledged this conflict (Pet. App. 12a).

For these reasons and the reasons set forth in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted and the judgment of the court of appeals should be reversed.

REX E. LEE
Solicitor General

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BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the Fifth Amendment privilege against compelled self-incrimination protects the contents of an individual's voluntarily prepared financial records.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 745 F.2d 834. The opinion of the district court (Pet. App. 13a-14a) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 16a) was entered on September 24, 1984. The petition for a writ of certiorari was filed on November 21, 1984, and granted on January 21, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment provides in pertinent part:

> No person * * * shall be compelled in any criminal case to be a witness against himself * * *.

STATEMENT

1. From the summer of 1983 to the present, a federal grand jury in Alexandria, Virginia, has investigated a variety of narcotics, tax, and currency violations believed to have occurred from 1974 to 1985. Respondent was and is a target of the investigation, which has explored evidence that he and others distributed large quantities of marijuana and hashish in the Eastern District of Virginia and elsewhere in the United States. Internal Revenue Service agents have assisted the investigation to determine, inter alia, whether respondent's participation in the narcotics enterprise yielded unreported income. See Pet. App. 2a.

In March 1984, the grand jury caused a subpoena to be served on respondent directing him to appear before the grand jury on April 17, 1984, and to bring with him a variety of documents (Pet. App. 17a-20a). The items demanded encompass approximately a dozen kinds of common financial records, including records of real estate transactions, bank statements, cancelled checks, loan agreements, brokerage account records, and credit card receipts. The subpoena also required respondent to furnish records of payments made to attorneys, funds deposited with attorneys or law firms, and records of the purchase, sale, or distribution of controlled substances, including documents naming suppliers and customers. In addition, the subpoena demanded production of financial rec-

ords maintained by respondent's businesses, including sole proprietorships.

Respondent agreed to furnish the records of his businesses, but he moved to quash the remainder of the subpoena, asserting (1) that it was overbroad and sought production of material irrelevant to the investigation and (2) that the required production of "personal" records violated his Fifth Amendment privilege against self-incrimination. See C.A. App. 7-8. The government responded by offering act-of-production immunity with respect to the records covered by the claims of privilege. See Pet. App. 1a-2a, 5a. The district court rejected respondent's argument concerning overbreadth and irrelevance. However, the court granted the motion to quash that part of the subpoena requiring respondent to produce "his personal, as opposed to his business[] records" (Pet. App. 13a). In response to the government's argument that the contents of preexisting records are not protected by the Fifth Amendment privilege, as interpreted in *United States* v. *Doe*, No. 82-786 (Feb. 28, 1984), the court stated (Pet. App. 13a n.1) that *Doe* "concerned only business records." The court observed (*ibid.*) that "the logical extension" of *Doe* "is to exempt private papers from Fifth Amendment protection." The court acknowledged that *Boyd* v. *United States*, 116 U.S. 616 (1886), which held that the contents of "private papers" are protected by the Fifth Amendment privilege, had been "discredited insofar as business records are concerned" (Pet. App. 13a n.1), but it nevertheless felt "obliged" to follow *Boyd* until it was expressly overruled.

The court directed respondent to furnish for in camera inspection a list of all documents asserted to be personal, together with sufficient identification to

enable the court to determine whether the particular listed document was a "personal" or a "business" record. See Pet. App. 13a. At the same time, and at the government's unopposed request, the court granted respondent formal immunity for the act of producing the documents, pursuant to 18 U.S.C. 6002 and 6003. C.A. App. 57-58; see Pet. App. 1a-2a, 5a.

Following its inspection of the list respondent furnished, the court concluded that the documents designated were "clearly * * * personal" and therefore exempt from production to the grand jury (Pet. App. 13a). The court noted that, "[i]ronically many of the documents consist of checks, vouchers or [other] documents, the original or copies of which are in the hands of third parties. These probably could be obtained from the third parties by a grand jury subpoena if the government knew their whereabouts" (Pet. App. 13a-14a).[1]

2. The court of appeals affirmed (Pet. App. 1a-12a), relying (*id.* at 7a) on "the long-standing holding of the Supreme Court, first enunciated in *Boyd*." The court noted that *Boyd* had refused to recognize any substantial difference between the "seizure of a man's private books and papers" and "compelling him to be a witness against himself." Pet. App. 8a-9a, quoting *Boyd*, 116 U.S. at 633. The court then quoted *Boyd*'s statement (116 U.S. at 634-635) that "compulsory production of the private books and papers of the owner of goods sought to be forfeited in such a suit is compelling him to be a witness against himself,

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[1] The district court did not, however, regard the availability of respondent's personal papers to third parties as constituting a waiver of respondent's Fifth Amendment privilege (Pet. App. 14a).

within the meaning of the Fifth Amendment to the Constitution." Pet. App. 9a.

The court of appeals observed (Pet. App. 9a) that statements in several decisions of this Court, culminating with the decision in *Bellis* v. *United States*, 417 U.S. 85 (1974), "reaffirmed *Boyd's* essential holding." The court then stated (Pet. App. 10a) that "[n]o later decision of the Supreme Court has held to the contrary on the point directly in issue" and that none of this Court's more recent decisions "has overruled *Boyd*." Specifically, the court believed that "dicta" in *Fisher* v. *United States*, 425 U.S. 391 (1976), and *Doe* did not require a different result because "[t]he *Fisher* Court took pains to distinguish *Boyd*," while *Doe* "merely reiterated the well-established premise that an individual holding the documents of an artificial entity, whether a corporation, partnership or sole proprietorship, cannot assert a fifth amendment privilege." Pet. App. 10a.

The court rejected the government's argument that the subpoenaed documents were not personal in any meaningful sense and were indistinguishable from the financial records at issue in *Doe*. The court did not disagree with the proposition that the records were essentially identical to the proprietor's records in *Doe*, but it declined "to engage in a case-by-case content-based determination of the privacy interest attendant to a given document. The proper line, we feel, has been drawn—whether the documents are held in an individual or representative capacity" (Pet. App. 11a n.12).

3. On January 9, 1985, the grand jury returned a 48-count indictment charging respondent and 25 others with various violations of the federal narcotics,

firearms, tax, and currency laws (J.A. 3-64).[2] Other possible violations are still under investigation.[3]

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[2] Respondent was named in 24 counts. He was charged with conspiracy to distribute marijuana, in violation of 21 U.S.C. 846 (Count 1); engaging in a continuing criminal enterprise, in violation of 21 U.S.C. 848 (Count 2); possession with intent to distribute over 14 tons of marijuana and hashish, in violation of 21 U.S.C. 841(a)(1) (Counts 3, 4, 5, 6, 8, 9); conspiracy to possess and to transfer machine guns and silencers, in violation of 18 U.S.C. 371 (Count 13); possession of nine unregistered machine guns and five unregistered silencers, in violation of 26 U.S.C. 5861(d) and 5871 (Counts 14-15); transfer of those same weapons, in violation of 18 U.S.C. 922(a)(5) and 26 U.S.C. 5861(e) and 5871 (Counts 16-19); transporting over $5,000 in cash to the Bahamas without filing the required currency report, in violation of 31 C.F.R. 103.23(a), 103.25(b), 103.49, and 31 U.S.C. 5316 (Count 20); aiding and abetting an individual to travel interstate for the purpose of promoting the distribution of marijuana, in violation of 18 U.S.C. 1952(a)(3) (Count 23); filing false corporate tax returns, in violation of 26 U.S.C. 7206(1) (Counts 39-41, 43); aiding the preparation of a false corporate tax return, in violation of 26 U.S.C. 7206(2) (Count 42); obstruction of justice, in violation of 18 U.S.C. 1503 (Count 47); and subornation of perjury, in violation of 18 U.S.C. 1622 (Count 48).

[3] An unrelated aspect of this case is currently before the court of appeals. The government has appealed (No. 85-1001) from an order of the district court disqualifying the Assistant United States Attorney and the case agents because they inadvertently viewed documents protected by the attorney-client privilege. The documents were contained in a box of papers provided to the government by the court after the court head supposedly removed all documents protected by the privilege. This appeal is still pending, as are defense motions in the district court to dismiss the indictment and disqualify the United States Attorney's office on account of this incident.

SUMMARY OF ARGUMENT

This Court's decisions in *United States* v. *Doe*, No. 82-786 (Feb. 28, 1984), and *Fisher* v. *United States*, 425 U.S. 391, 409 (1976), make it more than clear that the Fifth Amendment does not protect the contents of records voluntarily prepared before a subpoena for them is issued. The Fifth Amendment's provision that "[n]o person * * * shall be compelled in any criminal case to be a witness against himself" was intended to preclude the practice of forcing suspects "to admit guilt from their own lips." *Andresen* v. *Maryland*, 427 U.S. 463, 470 (1976), quoting *Michigan* v. *Tucker*, 417 U.S. 433, 440 (1974). The privilege therefore applies only when the government compels an individual to make a self-incriminating testimonial communication.

When an individual voluntarily prepares, collects, or maintains documents, no compulsion is present, and the Fifth Amendment privilege does not apply. If the individual is subsequently served with a subpoena duces tecum seeking those documents, he is compelled by the subpoena to produce them but not "to restate, repeat, or affirm the truth of the contents of the documents sought. Therefore, the Fifth Amendment would not be violated by the fact alone that the papers on their face might incriminate the [individual], for the privilege protects a person only against being incriminated by his own compelled testimonial communications." *Fisher* v. *United States*, 425 U.S. 391, 409 (1976). Accord, *United States* v. *Doe*, No. 82-786 (Feb. 28, 1984), slip op. 5-7. In short, the Fifth Amendment privilege does not shield the contents of documents that were voluntarily prepared, collected, and maintained, because the contents of such documents are not the product of proscribed

government compulsion. This broad principle obviously applies whether or not the person upon whom the subpoena is served is the author or owner of the documents.

The court of appeals refused to heed the teaching of *Doe* and *Fisher* for two invalid reasons. First, the court relied (Pet. App. 6a-10a) on the rule derived from *Boyd* v. *United States*, 116 U.S. 616 (1886), that private books and papers may not be subpoenaed. The court of appeals noted (Pet. App. 10a) that *Boyd* has never been expressly overruled and that its teaching served to protect personal privacy (Pet. App. 11a). *Fisher* and *Doe* leave no doubt, however, that *Boyd*'s interpretation of the privilege is no longer good law. Furthermore, the view that the Fifth Amendment privilege provides a generalized protection for personal privacy is incompatible with decisions of this Court holding that testimony can be compelled pursuant to a grant of immunity (*Kastigar* v. *United States*, 406 U.S. 441 (1972)), and that private records may be taken in a search (*Andresen* v. *Maryland*, *supra*).

Second, the court of appeals interpreted *Doe* as applying only to documents held by "an artificial entity, whether a corporation, partnership, or sole proprietorship" (Pet. App. 10a) and not to records held by an individual. *Doe*, however, drew no such distinction. Moreover, a sole proprietorship is not an artificial entity. A sole proprietorship has no legal existence apart from its owner; it is simply a term used to describe a business conducted by a person in his personal capacity rather than through a corporation or partnership. Thus, there is no meaningful distinction between the sole proprietorship records sought in *Doe* and the "personal" business and financial records that are in dispute here.

While it is our submission that the Fifth Amendment does not protect the contents of any papers created without government compulsion, a zone of privacy rationale would not in any event support recognition of the privilege in a case like this. The subpoena called only for common types of business or financial records, such as sales contracts, financial statements, and deeds. It did not seek records like diaries or personal letters that touch upon the more intimate aspects of an individual's life.

ARGUMENT

THE FIFTH AMENDMENT PRIVILEGE AGAINST COMPELLED SELF-INCRIMINATION DOES NOT PROTECT THE CONTENTS OF DOCUMENTS THAT WERE NOT PREPARED UNDER GOVERNMENT COMPULSION

The court of appeals in this case held that the Fifth Amendment privilege protects the contents of voluntarily prepared business and financial records. This view of the privilege is clearly wrong and has been emphatically rejected by this Court.[4]

A. The Fifth Amendment provides that "[n]o person * * * shall be compelled in any criminal case to

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[4] This case is not moot despite respondent's indictment (see pages 5-6 & note 2, *supra*). The grand jury did not charge respondent with any violations pertaining to his personal tax liability. In connection with that continuing investigation, the grand jury still wishes to examine the records that were subpoenaed in March 1984 and that are at issue here. The government may also wish to issue a trial subpoena for the same documents if the trial of the pending charges is delayed until after the decision in the instant case or if, because of mistrial or reversal on appeal, the charges are retried at some later date.

be a witness against himself." As the Court often has noted, the development of this protection was in part a response to certain historical practices, such as ecclesiastical inquisitions and the proceedings of the Star Chamber, " 'which placed a premium on compelling subjects of the investigation to admit guilt from their own lips.' " *Andresen* v. *Maryland*, 427 U.S. 463, 470 (1976), quoting *Michigan* v. *Tucker*, 417 U.S. 433, 440 (1974). This constitutional prohibition "demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth." *Miranda* v. *Arizona*, 384 U.S. 436, 460 (1966).

Consistent with the language and history of the Fifth Amendment, this Court has repeatedly indicated that the privilege against self-incrimination applies only when the accused is compelled to make an incriminating statement. See, *e.g.*, *United States* v. *Doe*, No. 82-786 (Feb. 28, 1984), slip op. 5; *Andresen*, 427 U.S. at 477; *Fisher* v. *United States*, 425 U.S. 391, 399 (1976); *Olmstead* v. *United States*, 277 U.S. 438, 462 (1928). "[U]nless incriminating testimony is 'compelled,' any invasion of privacy is outside the scope of the Fifth Amendment's protection." *Andresen*, 427 U.S. at 477.

This Court has also consistently held that the privilege applies only when the accused is forced to make a testimonial communication and not when he is compelled to become the source of "real or physical" evidence. See *Gilbert* v. *California*, 388 U.S. 263, 265-267 (1967); *United States* v. *Wade*, 388 U.S. 218, 222-223 (1967); *Schmerber* v. *California*, 384 U.S.

757, 764 (1966); *Holt* v. *United States*, 218 U.S. 245 (1910).

It follows from these principles that the Fifth Amendment does not protect an individual against governmental use of incriminating documents voluntarily prepared by him, and that a subpoena for such documents may not be resisted solely because of the self-incriminatory potential of their contents. Although the act of turning over a document pursuant to subpoena is most assuredly compelled, it involves no testimony about the *contents* of the document, but merely their physical delivery. And to the extent that the document itself is testimonial in nature, the Fifth Amendment is inapplicable because the creation of the document did not spring from the compulsion of the subpoena. As one leading authority has stated (*McCormicks Handbook of the Law of Evidence* § 128, at 269 (E. Cleary 2d ed. 1972)), preparation of such documents

> may or may not have been testimonial, depending upon whether [the author] intended that the transcription serve the function of communicating his thoughts to another individual, but in any event authorizing the use of such transcriptions would not encourage police to exert the types of coercion that the privilege historically protected against, because by definition these transcriptions would have been made before the opportunity for coercion existed.

B. Any doubt that the contents of preexisting business or financial documents are not privileged under the Fifth Amendment was dispelled by this Court's decisions in *Fisher* and *Doe*. In *Fisher*, taxpayers under investigation by the Internal Revenue Service retrieved papers from their accountants and delivered them to their attorneys (425 U.S. at 394). None of

the documents was prepared by the taxpayers, but the documents contained information taken from the taxpayers' books and records (*ibid.*). The Court held that the attorneys could not resist an IRS summons on the ground of attorney-client privilege because the Fifth Amendment would not have prevented compelled disclosure of the documents if they had remained in the possession of the taxpayers themselves. The Court explained (*id.* at 409):

> A subpoena served on a taxpayer requiring him to produce an accountant's workpapers in his possession without doubt involves substantial compulsion. But it does not compel oral testimony; nor would it ordinarily compel the taxpayer to restate, repeat, or affirm the truth of the contents of the documents sought. Therefore, the Fifth Amendment would not be violated by the fact alone that the papers on their face might incriminate the taxpayer, for the privilege protects a person only against being incriminated by his own compelled testimonial communications.

The Court went on to stress that the Fifth Amendment does not protect any privacy interest in the contents of voluntarily prepared documents even when the documents have been written by the person asserting the privilege (425 U.S. at 410 n.11). Rather, the Court observed, the privilege applies only when the accused is compelled to make a testimonial communication that is incriminating (*id.* at 399, 408), and therefore "unless the Government has compelled the subpoenaed person to write the document * * * the fact that it was written by him is not controlling with respect to the Fifth Amendment issue" (*id.* at 410 n.11). The Court reserved the possibility, however, that in some circumstances the compelled

act of producing a document pursuant to subpoena might be considered the equivalent of incriminating testimony—either because the act concedes "the existence of the papers demanded and their possession or control by the taxpayer" or because it serves to authenticate them. *Id.* at 410.

Fisher's explication of the Fifth Amendment privilege made perfectly clear that while the act of producing a document might in some circumstances be tantamount to "testimony" within the protection of the privilege, a person cannot avoid compliance with a documentary subpoena based solely upon the contents of a document that was not prepared under government compulsion. However, while *Fisher*'s reasoning had implications extending far beyond the particular situation in that case, the Court concluded its opinion by stating (425 U.S. at 414):

> Whether the Fifth Amendment would shield the taxpayer from producing his own tax records in his possession is a question not involved here; for the papers demanded here are not his "private papers," see *Boyd* v. *United States*, 116 U.S. at 634-635.

Seizing on this passage, several lower courts held in the wake of *Fisher* that the Fifth Amendment privilege shielded the contents of voluntarily prepared records under a "protection-of-private-papers principle" derived from *Boyd*. *In re Grand Jury Empanelled March 19, 1980*, 680 F.2d 327, 332-333 n.7 (3d Cir. 1982), rev'd in part and aff'd in part *sub nom. United States* v *Doe*, No. 82-786 (Feb. 28, 1984); see also *United States* v. *Miller*, 660 F.2d 563, 566-567 (5th Cir. 1981); *United States* v. *Davis*, 636 F.2d 1028, 1043 (5th Cir.), cert. denied, 454 U.S. 862 (1981). We therefore petitioned for certiorari in

Doe to resolve the question "whether the Fifth Amendment protects the contents of an individual's business records" (Pet. at 9, *United States* v. *Doe*, *supra*).

The Court granted review and unambiguously answered that question, holding that the contents of such records are not protected. The Court wrote (*United States* v. *Doe*, slip op. 5-7; footnotes omitted):

> The Court in *Fisher* expressly declined to reach the question whether the Fifth Amendment privilege protects the contents of an individual's tax records in his possession. The rationale underlying our holding in that case is, however, persuasive here. As we noted in *Fisher*, the Fifth Amendment protects the person asserting the privilege only from *compelled* self-incrimination. 425 U.S., at 396. Where the preparation of business records is voluntary, no compulsion is present.
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> * * * * *
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> Respondent does not contend that he prepared the documents involuntarily or that the subpoena would force him to restate, repeat, or affirm the truth of their contents. The fact that the records are in respondent's possession is irrelevant to the determination of whether the creation of the records was compelled. We therefore hold that the contents of those records are not privileged.

Justice O'Connor filed a separate concurring opinion "to make explicit what [was] implicit in the [Court's] opinion: that the Fifth Amendment provides absolutely no protection for the contents of private papers of any kind." See *United States* v. *Doe*, *supra*.

Although three members of the Court dissented in part, none suggested that the contents of voluntarily prepared business records enjoy any Fifth Amendment protection. In fact, Justice Marshall, joined by Justice Brennan, pointedly noted (*Doe*, slip op. 2; footnotes omitted) that "the documents at stake here are business records which implicate a lesser degree of concern for privacy interests than, for example, personal diaries."

C. One of the reasons given by the court of appeals for refusing to follow the teaching of *Fisher* and *Doe* was that, because this Court has never expressly overruled *Boyd*, it was free to follow *Boyd*'s conflicting interpretation of the Fifth Amendment privilege (see Pet. App. 6a-10a). But while this Court has not overruled *Boyd* in so many words, there can be no doubt that *Boyd*'s interpretation of the Fifth Amendment is erroneous and should not be followed.[5]

1. As this Court has pointed out (*Fisher*, 425 U.S. at 408-409), *Boyd* was built upon legal foundations that have long since been obliterated. In *Boyd*, a partnership was believed to have fraudulently evaded paying the tariff on imported plate glass. The penalty for this offense was forfeiture of the imported goods, and therefore the government seized the glass and instituted forfeiture proceedings. Pursuant to statute, the district court ordered production of invoices that the government alleged would establish fraudulent nonpayment of duties. This same statute

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[5] In view of the persistent adherence to *Boyd* by some of the lower courts, even though *Boyd*'s interpretation of the Fifth Amendment privilege has been thoroughly discredited, the express overruling of *Boyd* would be appropriate and beneficial.

provided that failure to comply with such an order would be treated as an admission of the government's allegations. The partners complied under protest, and judgment of forfeiture was entered. 116 U.S. at 617-618.

This Court reversed, holding that the order and statute violated the Fourth and Fifth Amendments. The opinion began by stating that the order requiring production of the invoices constituted a search and seizure within the meaning of the Fourth Amendment "because it is a material ingredient, and effects the sole object and purpose of search and seizure" (116 U.S. at 622). Turning to the question whether this search and seizure was "unreasonable," the opinion looked to the common law to determine whether a search for the invoices would have constituted a trespass (*id.* at 622-633). Relying principally upon the English case of *Entick* v. *Carrington*, 19 Howell's State Trials 1029 [C.P. 1765], it concluded that a search and seizure were unreasonable unless the government's title to the items seized was superior to that of the person from whom they were taken. Thus, the government could search for and seize stolen property, since the possessor did not have title (116 U.S. at 624). Likewise, the government could search for and seize goods on which duty was owed, because "the government has an interest in them for the payment of the duties thereon" (*ibid.*). But the government could not search for and seize mere evidence because property law did not give the government title to such items (*id.* at 624-633).

Having concluded that the order compelling production of the invoices had violated the Fourth Amendment, the Court still faced the question

whether their admission in the forfeiture proceeding had been erroneous, since the exclusionary rule for Fourth Amendment violations would not be adopted until 31 years later in *Weeks* v. *United States*, 232 U.S. 383 (1914). Noting (116 U.S. at 633) "the intimate relation[ship] between" the Fourth and Fifth Amendments, the Court held that the admission into evidence of books and papers obtained in violation of the Fourth Amendment constituted a violation of the Fifth Amendment. It stated (116 U.S. at 633): "[W]e have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself."

What is perhaps most remarkable about *Boyd* is how little of its reasoning has stood the test of time. Today it is well established (a) that a partnership such as the Boyd firm may not resist production of its records on Fifth Amendment grounds (*Bellis* v. *United States*, 417 U.S. 85 (1974)); (b) that an order compelling production of invoices is not a search or seizure because there can be no reasonable expectation of privacy in such documents, which are knowingly exposed to the public (see *United States* v. *Miller*, 425 U.S. 435, 440-443 (1976); *Katz* v. *United States*, 389 U.S. 347, 351-352 (1967)); (c) that, even assuming such an order constituted a search and seizure, the Fourth Amendment permits the seizure of "mere evidence" (*Warden* v. *Hayden*, 387 U.S. 294 (1967)); (d) that, again assuming that such an order was a search and seizure, the Fifth Amendment was not violated because no testimonial communication was compelled (*Andresen* v. *Maryland*, *supra*); and (e) that the introduction of evidence obtained in violation of the Fourth Amendment does

not violate the Fifth Amendment (see, *e.g.*, *United States* v. *Calandra*, 414 U.S. 338, 348 (1974)).

Moreover, the view that *Boyd* provided special protection for private papers, as opposed to other "mere evidence," is not even supported by *Boyd*'s reasoning. *Boyd* did not rest upon the special status of books and records but upon the fact that the government did not have superior title to and consequently could not seize mere evidence. As the Court stated in *Gouled* v. *United States*, 255 U.S. 298, 309 (1921) (emphasis added), which reaffirmed *Boyd* and applied it to a traditional search and seizure conducted pursuant to a facially valid warrant:

> *There is no special sanctity in papers, as distinguished from other forms of property*, to render them immune from search and seizure, if only they fall within the scope of the principles of the cases in which other property may be seized, and if they be adequately described in the affidavit and warrant. Stolen or forged papers have been so seized, * * * and lottery tickets, under a statute prohibiting their possession with intent to sell them * * * and we cannot doubt that contracts may be so used as instruments or agencies for perpetrating frauds upon the Government as to give the public an interest in them which would justify the search for and seizure of them, under a properly issued search warrant, for the purpose of preventing further frauds.

During the era when *Boyd* held sway, seizures of incriminating papers were consistently upheld in cases such as *Marron* v. *United States*, 275 U.S. 192 (1927); *United States* v. *Lefkowitz*, 285 U.S. 452, 465-466 (1932); and *Abel* v. *United States*, 362 U.S. 217, 238 (1960), subject only to the then-prevailing

requirement that the papers constitute instrumentalities of crime rather than "mere evidence." All these cases refute the notion that *Boyd* conferred special status upon papers either for Fourth or Fifth Amendment purposes.

2. In recent years, this Court has made it more than clear that *Boyd's* interpretation of the Fifth Amendment privilege is no longer good law. In *Fisher*, the Court noted (425 U.S. at 408) that "[t]he pronouncement in *Boyd* that a person may not be forced to produce his private papers has * * * often appeared as dictum in later opinions of this Court." However, the Court explained (425 U.S. at 409) that "the foundations for the rule have been washed away." The Court added (*ibid.*):

> In consequence, the prohibition against forcing the production of private papers has long been a rule searching for a rationale consistent with the proscriptions of the Fifth Amendment against compelling a person to give "testimony" that incriminates him.

The Court also expressly rejected the argument, which the court of appeals in this case adopted (see Pet. App. 11a-12a), that the Fifth Amendment privilege was intended to protect privacy in a generalized way. The *Fisher* court wrote (425 U.S. at 399; footnote omitted):

> Within the limits imposed by the language of the Fifth Amendment, which we necessarily observe, the privilege truly serves privacy interests; but the Court has never on any ground, personal privacy included, applied the Fifth Amendment to prevent the otherwise proper acquisition or use of evidence which, in the Court's view, did

> not involve compelled testimonial self-incrimination of some sort.

Decisions of this Court holding that an individual's papers may be seized pursuant to a search warrant (*Andresen* v. *Maryland*, 427 U.S. 463 (1976)) and that testimony otherwise protected by the Fifth Amendment may be compelled pursuant to a grant of immunity (*Kastigar* v. *United States*, 406 U.S. 441 (1972)) also leave no room to argue that the Fifth Amendment privilege exists for the independent purpose of protecting personal privacy.

Following *Fisher*, *Doe* further confirmed *Boyd*'s demise. Faced with a court of appeals' decision that "continued to recognize *Boyd*'s protection-of-private-papers principle" (680 F.2d at 332-333 n.7), the Court again made clear that this view of the Fifth Amendment privilege had been discredited (*Doe*, slip op. 5-6 & nn.8, 10). The Court noted (*id.* at 7 n.10) that *Andresen* had "dismissed" the argument that dicta from later cases continued to support *Boyd*. And, the Court continued (*Doe*, slip op. 7 n.10):

> Although *Andresen* involved a search warrant rather than a subpoena, the underlying principle is the same in this context. If the party asserting the Fifth Amendment privilege has voluntarily compiled the document, no compulsion is present and the contents of the document are not privileged.

D. The court of appeals' second reason for refusing to apply *Doe* in this case was that *Doe* "merely reiterated the well-established premise that an individual holding the documents of an artificial entity, whether a corporation, partnership or sole proprietorship, cannot assert a fifth amendment privilege" (Pet. App.

10a). It is abundantly clear, however, that *Doe* did not treat the individual whose business records were subpoenaed in that case as an "artificial entity." Nowhere in the Court's opinion is there a hint of a distinction between the records of a sole proprietorship and an individual's business records. On the contrary, the Court referred interchangeably to the records in *Doe* as "the business records of a sole proprietorship" (slip op. 1) and "his [*i.e.*, the respondent's] business records" (*id.* at 11 & n.17). Moreover, the Court held that in *Doe* for the act of producing the subpoenaed records, immunity was required without suggesting that this conclusion was at all inconsistent with this Court's line of cases that had firmly established that the custodian of the records of an "artificial entity," such as a corporation or partnership, may be compelled to comply with a documentary subpoena without immunity of any kind. See *Fisher*, 425 U.S. at 408, 413. If the Court had regarded the sole proprietorship as an "artificial entity," then the act of production would not have been privileged.

In any event, the court of appeals' description of a sole proprietorship as an "artificial entity" (Pet. App. 10a) is flatly wrong, and its distinction between the business records of a sole proprietorship and an individual's business or financial records makes no sense. A sole proprietorship is not an artificial entity; it "has no legal existence apart from its owner." *In re Grand Jury Empanelled February 14, 1978*, 597 F.2d 851, 859 (3d Cir. 1979). "Sole proprietorship" is simply a term used to describe a business conducted by an individual in his personal capacity rather than through a partnership or corporation The assets and debts of the sole proprietorship are those of the individual owner and vice versa The

sole proprietorship dies with the owner. The sole proprietorship does not pay taxes or even file a separate tax return; instead, its income is taxable to the owner. A person who owns a sole proprietorship is under no obligation to separate records relating directly to his business from any of his other financial records. Nor is a person who owns several separate businesses that are run as sole proprietorships required to segregate the records of each. In such situations, all of the assets, liabilities, and documents reflecting them are regarded for virtually all legal purposes—*e.g.*, taxes, creditors' rights, inheritance, alimony and child support—as those of the individual.

Even where the individual segregates the records of his businesses, it makes no sense to distinguish between the records of a sole proprietorship and the business or financial records of the individual. For example, documents showing income received by the individual show income on which the "sole proprietor" may draw. Likewise, records memorializing the individual's debts necessarily reflect the "sole proprietor's" liabilities. And finally, assuming (as the indictment alleges) that respondent earns his income from illicit drug transactions and invests the proceeds in, for example, real estate, then he is as much a "sole proprietor" of drug and real estate ventures as the respondent in *Doe* was of his businesses. The distinction sought to be drawn by the court of appeals is thus wholly without substance.[6]

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[6] Respondent maintains (Br. in Opp. 13-14) that this distinction is analogous to the distinction in First Amendment law between commercial and noncommercial speech. There are two glaring flaws in this comparison. First, the court of appeals in this case did not distinguish between commercial and noncommercial records, for there can be no doubt that the subpoenaed records are of a commercial or business na-

E. Under the logic of *Fisher*, *Andresen*, and *Doe*, the contents of even the most personal papers would not appear to be privileged under the Fifth Amendment. See *Doe*, slip op. (O'Connor, J., concurring); *United States* v. *Nobles*, 422 U.S. 225, 233 n.7 (1975). And in our view, it would be unjustified to extend the Fifth Amendment privilege beyond its traditional role of protecting against compelled testimonial disclosures, in order to serve privacy interests associated with particular types of documents. In the first place, as we previously noted (page 20, *supra*), the privacy-protection component thereby injected into Fifth Amendment analysis would be entirely incompatible with the settled principle that disclosure can be compelled through an adequate grant of immunity. Beyond that, use of the Fifth Amendment privilege for this purpose is probably unnecessary. Certainly it is not immediately apparent why unreasonable and unjustified official examination of intimately private documents cannot be adequately controlled through application of First and Fourth Amendment principles, which after all embody the relevant policies. For example, it may be appropriate, as a matter of Fourth Amendment law, to require an exceptionally high showing of need before government officials may reasonably be permitted to examine the contents of a personal diary; but it makes absolutely no sense, in terms of privacy protection concerns, to make the right to read the diary turn upon whether it is found during a lawful search of an automobile or produced pursuant to a subpoena.

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ture (see Pet. App. 18a-20a). Second, while the First Amendment undoubtedly protects the contents of speech, the Fifth Amendment privilege merely protects against compelled testimonial self-incrimination.

In any event, the documents at issue in this case are of a business or financial nature [7] and do not touch upon "the more intimate aspects of one's life." [8]

---

[7] Respondent has contended (Br. in Opp. 4-5 (emphasis in original)) that "this case involves *personal* records, not 'financial records' nor 'business records' as petitioner would prefer to describe them." Respodent's assertion is highly misleading. To be sure, the subpoena and the lower court opinions described the records as "personal." But all that this description meant was that they were not the records of any corporation, partnership, or identified sole proprietorship. The suggestion that the subpoenaed records are not "financial" or "business" documents is flatly wrong, as a brief examination of the subpoena (Pet. App. 18a-20a) will reveal.

[8] Indeed, as the district court observed (Pet. App. 14a), many of the documents are duplicates of documents held by third parties, such as respondent's bank. Accordingly, respondent has no legitimate privacy expectation in the contents of those documents. As the Court explained in *United States* v. *Miller*, 425 U.S. at 442-443, where it was argued that an individual had a legitimate expectation of privacy in records kept by his bank:

> Even if we direct our attention to the original checks and deposit slips, rather than to the microfilm copies actually viewed and obtained by means of the subpoena, we perceive no legitimate "expectation of privacy" in their contents. The checks are not confidential communications but negotiable instruments to be used in commercial transactions. All of the documents obtained, including financial statements and deposit slips, contain only information voluntarily conveyed to the banks and exposed to their employees in the ordinary course of business.

Although *Miller* speaks only of bank records, its teaching applies with equal force to each of the categories of documents at issue in this case. The bulk of the documents subpoenaed are records of commercial transactions that by their nature require disclosure to third parties, often total strangers. There is simply no reasonable expectation of privacy inherent in documents of this kind.

Fisher, 425 U.S. at 425-427 (Brennan, J., concurring); see also *Doe*, slip op. 2 (Marshall, J., dissenting); *Andresen*, 427 U.S. at 486 (Brennan, J., dissenting). In Judge Friendly's apt phrase, the sort of documents involved here—such as sales contracts, financial statements, and deeds (see Pet. App. 17a-20a)—are not "the outpourings of an individual's soul." Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. Cin. L. Rev. 671, 703 (1968).[9]

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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Deputy Solicitor General

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MARCH 1985

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[9] Respondent has attempted (Br. in Opp. 12) to pass off the records of his illegal drug deals as "tantamount" to a "private diary." We very much doubt, however, that drug ledgers are what members of this Court had in mind in suggesting that the contents of some intimate documents may enjoy Fifth Amendment protection. See *United States* v. *Doe*, No. 82-786 (Feb. 28, 1984), slip op. 2 (Marshall, J., dissenting); *Andresen* v. *Maryland*, 427 U.S. 463, 486 (1976) (Brennan, J., dissenting).

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(5)

No. 84-823

In the Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES OF AMERICA, PETITIONER

v.

JOHN DOE No. 462

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

JOINT APPENDIX

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PETITION FOR A WRIT OF CERTIORARI FILED NOVEMBER 21, 1984
CERTIORARI GRANTED JANUARY 21, 1985

SHPP

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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA

In Re: Grand Jury 83-2

UNITED STATES

vs.

JOHN DOE No. 462

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
1984	
Apr. 10	NOTICE returnable 4-13-84 together with MOTION of Reckmeyer to Quash Subpoenas Duces Tecum in part and Protective Order filed by deft. cs
Apr. 10	BRIEF in Support of Motion to Quash Subpoenas Duces Tecum in Part and for Protective Order together with Exhibits filed by deft. cs
Apr. 13	ORDER denying motion to quash (AVB) cs
Apr. 13	ORDER of Immunity (AVB) cs
Apr. 13	MOTION together with Exhibits—filed by U.S. cs
Apr. 13	GOVERNMENTS RESPONSE in Opposition to Reckmeyer's Motion to Quash and for a Protective Order filed by U.S. cs
Apr. 19	MEMO Opinion and ORDER—(AVB)—filed cs
May 4	TRANSCRIPT of April 13, 1984—filed cs
May 18	NOTICE of Appeal—filed by U.S. cs

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 84-1527

UNITED STATES OF AMERICA, APPELLANT

v.

(UNDER SEAL)

RELEVANT DOCKET ENTRIES

BRIEF AND APPENDIX	
APPX	6-6-84 6 filed. CS-sc (stored in vault)
A/P BRF	6-6-84 12 filed. CS-sc (stored in vault)
E/R BRF	6-26-84 12 filed. PM/mb (stored in vault)
REPLY	7-2-84 12 filed. CS/mb (stored in vault)

SUMMARY OF EVENTS

ARGUMENT 7/11/84
REOPENED
PANEL (JDP) FDM SJE
OPINION Sept. 24, 1984
JUDGMENT Sept. 24, 1984
DISPOSITION aff P jrg

MANDATE ISSUED
11-2-84 lgs
RECORD RETURNED
11-2-84 lgs
CERTIORI 11/27/84 84-823
Granted 1/21/85 lgs

DATE	FILINGS—PROCEEDINGS
5/22/84	CASE docketed. ROA filed. (wu)
5/24/74	ORDER expediting appeal for briefing and oral argument; A's due 6/8/84—tentatively cal. for July term of court, filed. SAR: gac Copies to Dowd-Lipps; Welch; Hausen; Ramsey; Tandy.
6/27/84	MOTION (FF-71) to dismiss appeal for lack of jurisdiction of E, filed SAR: zyj Transmitted to JDP/FDM/SJE on 6/28/84.
7/9/84	MEMORANDUM of A in opposition to E's motion to dismiss appeal, filed (SAR: jm) Submitted directly to panel in New Bern.
10/4/84	MOTION of United States (JJ-20) for an ext. of time to 11/2/84 to file pet. for rehearing or pet. for rehearing with sugg. for rehearing in banc, filed. (jd)
10/5/84	ORDER granting motion JJ-20. A's pet. for rehearing due 11/2/84. (BMM:jd) Copy to counsel.
2/21/85	Record on Appeal in four (4) volumes transmitted to Supreme Court. lgs

In the United States District Court for the Eastern District of Virginia, Alexandria Division

UNITED STATES OF AMERICA

v.

CRIMINAL NO.

CHRISTOPHER FREDERICK RECKMEYER a/k/a "The Boss" a/k/a "The Rug Man" a/k/a "Big Brother" (Counts 1, 2, 7, 10, 12, 22, 24, 25, 26, 27, 28, 29, 30, 31)	Count 1: Count 2: Count 3:	21 USC 846 21 USC 848 21 USC 841(a)(1) 18 USC 2
ROBERT BRUCE RECKMEYER a/k/a "Little Brother" a/k/a "Robo" a/k/a "Blondie" (Counts 1, 2, 3, 4, 5, 6, 8, 9, 13, 14, 15, 16, 17, 18, 19, 20, 23, 39, 40, 41, 42, 43, 47, 48)	Count 4: Count 5: Count 6:	21 USC 841(a)(1) 18 USC 2 21 USC 841(a)(1) 18 USC 2 21 USC 841(a)(1) 18 USC 2
GREGORY ALAN JARRETT a/k/a "Scott" a/k/a "Wild Man" (Counts 1, 13, 14, 15, 16, 17)	Count 7: Count 8:	21 USC 841(a)(1) 18 USC 2 21 USC 841(a)(1) 18 USC 2
STEPHEN KING WORTH a/k/a "Patrick Nelson Pine"		

a/k/a "Patrick Bartley"	Count 9:	21 USC 841(a)(1)
a/k/a "Hippy Steve"		18 USC 2
(Counts 1, 32, 33)	Count 10:	21 USC 841(a)(1)
		18 USC 2
BRUCE WAYNE THOMASON		
a/k/a "Loose Bruce"		
a/k/a "Troy Clayton"	Count 11:	21 USC 841(a)(1)
(Counts 1, 2, 11, 12, 21, 44, 45, 46)		18 USC
	Count 12:	21 USC 841(a)(1)
THOMAS L. TUCKER		18 USC 2
a/k/a "Thomas E. Hawkins"		
(Counts 1, 7)	Count 13:	18 USC 371
PATRICK RYON HENDRY	Count 14:	26 USC 5861(d) & 5871
(Count 1)		
LEON D. HARVEY		
a/k/a "Smiles"	Count 16:	26 USC 5861(e) & 5871
(Counts 1, 8)		
	Count 17:	26 USC 5861(e) & 5871
PATRICIA L. RECKMEYER		
(Counts 1, 34, 35, 36, 37, 38)		
JAMES SAMUEL ADAMS	Count 18:	18 USC 922(a)(5)
(Count 1)		
	Count 19:	18 USC 922(a)(5)

DOUGLAS GRAIG COCHRAN (Counts 1, 12)	Count 20:	31 USC 5316 31 CFR 103.23(a) 31 CFR 103.25(b) 31 CFR 103.49
DAVID WINDSOR COOK (Count 1)		
CHARLES ARTHUR FRIEND, III a/k/a "Carlos"	Count 21:	18 USC 1014
(Counts 1, 10)	Count 22:	18 USC 1952(a)(3)
		18 USC 2
TIMOTHY PATRICK RUDDY a/k/a "Douglas Paul Harrison" a/k/a "Richard Dale Andrews"	Count 23:	18 USC 1952(a)(3)
		18 USC 2
(Counts 1, 12)	Count 24:	26 USC 7206(1)
	Count 30:	26 USC 7206(1)
ANDREWS JAMES MEYERS a/k/a "Carl"		18 USC 2
(Counts 1, 12, 13)	Count 25:	26 USC 7206(1)
		18 USC 2
JOHN CHRISTOPHER ROBINSON a/k/a "Chris Robertson"	Count 26:	26 USC 7206(2)
(Counts 1, 3)		18 USC 2
WILLIAM HARRIS SHARPE a/k/a "John Raymond Pavlovic"	Count 27:	26 USC 7206(1)
		18 USC 2

a/k/a "William, Schaffer"		
a/k/a "William Stewart Sharpe"	Count 28:	26 USC 7206(1)
a/k/a "William Simpson"		18 USC 2
a/k/a "J.R. Shaffer"		
a/k/a "William Harris"	Count 29:	26 USC 7206(2)
(Counts 1, 10)		
	Count 30:	26 USC 7206(1)
CHARLES ANTHONY SWEENEY		
a/k/a "David Eugene Reich"	Count 31:	26 USC 7206(1)
a/k/a "Tony"		
(Count 1)	Count 32:	26 USC 7206(1)
		18 USC 2
THOMAS WALLACE ASHTON		
(Counts 1, 3)	Count 33:	18 USC 2, 6 USC 7206(1)
		18 USC 2
SALVATORE F. VASTOLA		
a/k/a "Sal"	Count 34:	26 USC 7206(1)
(Count 1)		18 USC 2
CRAIG DOUGLAS SMITH	Count 35:	26 USC 7206(1)
a/k/a "Donald Fisher"		18 USC 2
a/k/a "Smitty"		
(Count 1)		
STEPHEN SCOTT JOHNSON	Count 36:	26 USC 7206(1)
a/k/a "Joseph Scott Henderson"		18 USC 2
a/k/a "Dan Bowen"		

(Counts 1, 13)	Count 37:	26 USC 7206(1)
		18 USC 2
RICHARD FRANCIS VAUGHN (Count 1)	Count 38:	26 USC 7206(1)
DONALD SHIRACK a/k/a "Don Shipley"	Count 39:	26 USC 7206(1)
a/k/a "Danial Shipley" (Count 1)	Count 40:	26 USC 7206(1)
FRANCOISE NASTA	Count 41:	26 USC 7206(1)
a/k/a "Frankie" (Count 1)	Count 42:	26 USC 7206(2)
JAN RICHARD GILLIE	Count 43:	26 USC 7206(1)
(Count 1)	Count 44:	26 USC 7206(1)
		18 USC 2
	Count 45:	26 USC 7206(1)
		18 USC 2
	Count 46:	26 USC 7206(1)
		18 USC 2
	Count 47:	18 USC 1503
	Count 48:	18 USC 1622

INTRODUCTION

At all times material to this Indictment:

1. CHRISTOPHER F. RECKMEYER (hereinafter referred to as "CHRIS RECKMEYER") was the owner of Crancy's, a sole proprietorship.

2. CHRIS RECKMEYER was the president of Crancy's, Inc., a corporation.

3. CHRIS RECKMEYER was the president of Organic Foods, Inc., a corporation.

4. CHRIS RECKMEYER was the only salesman of Unlimited Investments, Inc., a corporation.

5. CHRIS RECKMEYER was the co-owner of BCP, Inc., a corporation.

6. ROBERT BRUCE RECKMEYER (hereinafter referred to as "ROBERT RECKMEYER") was the president of United Trade, Inc., a corporation which also uses the name of "East West Design".

7. ROBERT RECKMEYER was the owner of Robert Bruce Products, sole proprietorship.

8. ROBERT RECKMEYER was the president of Atlantis Stone Corporation, a corporation.

9. PATRICK RYON HENDRY (hereinafter referred to as "PAT HENDRY") was the President of Patrick R. Hendry, Inc., a corporation.

10. PAT HENDRY was the president of the Royal Stone Corporation, a corporation.

11. BRUCE WAYNE THOMASON (hereinafter referred to as "BRUCE THOMASON") was the owner of Mainland Carpets, a sole proprietorship.

12. BRUCE THOMASON was the president of Mainland Carpets, Inc., a corporation.

13. ROBERT GOVERN was the president of G & M Investment Enterprises, Inc., a corporation.

14. STEPHEN KING WORTH (hereinafter referred to as "STEVE WORTH") was the owner of S & M Products, a sole proprietorship.

15. JAMES SAMUEL ADAMS (hereinafter referred to as "JIM ADAMS") was the owner of Eastern Investments, a sole proprietorship.

16. JIM ADAMS was the owner of Everyday Man Products, a sole proprietorship.

17. THOMAS L. TUCKER (hereinafter referred to as "TOM TUCKER") was the owner of New China Rugs, a sole proprietorship.

COUNT 1

THE GRAND JURY CHARGES THAT:

A. From in or about 1974, the exact date being to the grand jury unknown, and continuously thereafter up to and including the date of this Indictment, in the Eastern District of Virginia and elsewhere,

CHRISTOPHER FREDERICK RECKMEYER, II
a/k/a "The Boss"
a/k/a "The Rug Man"
a/k/a "Big Brother"
(hereinafter referred to as CHRIS RECKMEYER)
ROBERT BRUCE RECKMEYER,
a/k/a "Little Brother"
a/k/a "Robo"
a/k/a "Blondie"
(hereinafter referred to as ROBERT RECKMEYER)
GREGORY ALAN JARRETT,
a/k/a "Scott"
a/k/a "Wild Man"
(hereinafter referred to as GREG JARRETT)
STEPHEN KING WORTH,
a/k/a "Patrick Nelson Pine"
a/k/a "Patrick Bartley"
a/k/a "Hippy Steve"
(hereinafter referred to as STEVE WORTH)
BRUCE WAYNE THOMASON,
a/k/a "Loose Bruce"
a/k/a "Troy Clayton"
(hereinafter referred to as BRUCE THOMASON)
THOMAS L. TUCKER,
a/k/a "Thomas E. Hawkins"
(hereinafter referred to as TOM TUCKER)
PATRICK RYON HENDRY
(hereinafter referred to as PAT HENDRY)
LEON D. HARVEY
a/k/a "Smiles"
(hereinafter referred to as "LEE HARVEY")

PATRICIA L. RECKMEYER
(hereinafter referred to as PATRICIA RECKMEYER)
JAMES SAMUEL ADAMS
(hereinafter referred to as JIM ADAMS)
DOUGLAS CRAIG COCHRAN,
(hereinafter referred to as DOUGLAS COCHRAN)
DAVID WINDSOR COOK
(hereinafter referred to as DAVID COOK)
CHARLES ARTHUR FRIEND, III,
a/k/a "Carlos"
(hereinafter referred to as CHARLES FRIEND)
TIMOTHY PATRICK RUDDY,
a/k/a "Douglas Paul Harrison"
a/k/a "Richard Dale Andrews"
(hereinafter referred to as TIM RUDDY)
ANDREW JAMES MEYERS,
a/k/a "Carl"
(hereinafter referred to as CARL MEYERS)
JOHN CHRISTOPHER ROBINSON,
a/k/a "Chris Robertson"
(hereinafter referred to as CHRIS ROBERTSON)
WILLIAM HARRIS SHARPE
a/k/a "John Raymond Pavlovic"
a/k/a "William Schaffer"
a/k/a "William Stewart Sharpe"
a/k/a "William Simpson"
a/k/a "J. R. Shaffer"
a/k/a "William Harris"
(hereinafter referred to as WILLIAM SHARPE)
CHARLES ANTHONY SWEENEY,
a/k/a "David Eugene Reich"
a/k/a "Tony"
(hereinafter referred to as TONY SWEENEY)
THOMAS WALLACE ASHTON
(hereinafter referred to as TOM ASHTON)
SALVATORE F. VASTOLA,
a/k/a "Sal"

(hereinafter referred to as SAL VASTOLA)
CRAIG DOUGLAS SMITH
a/k/a "Donald Fisher"
a/k/a "Smitty"
(hereinafter referred to as CRAIG SMITH)
STEPHEN SCOTT JOHNSON
a/k/a "Joseph Scott Henderson"
a/k/a "Dan Bowen"
(hereinafter referred to as SCOTT JOHNSON)
RICHARD FRANCIS VAUGHN
(hereinafter referred to as RICHARD VAUGHN)
DONALD SHIRACK,
a/k/a "Don Shipley"
a/k/a "Danial Shipley"
(hereinafter referred to as DON SHIPLEY)
FRANCOISE NASTA,
a/k/a "Frankie"
(hereinafter referred to as FRANKIE NASTA)
JAN RICHARD GILLIE
(hereinafter referred to as JAN GILLIE)

the defendants herein, did unlawfully, knowingly and intentionally combine, conspire, confederate and agree together, with each other and with divers other persons to the grand jury known and unknown to commit the following offenses against the United States:

1. To knowingly, intentionally and unlawfully distribute Schedule I non-narcotic controlled substances that is, marijuana and hashish, in violation of Title 21, United States Code, Section 841(a)(1);

2. To knowingly, intentionally and unlawfully possess with intent to distribute Schedule I non-narcotic controlled substances, that is, marijuana and hashish, in violation of Title 21, United States Code, Section 841(a)(1).

B. *Ways, Manner and Means to Accomplish the Conspiracy*

The purpose of the conspiracy was to make money in and through drug trafficking and drug-related activities.

The ways, manner and means by which this purpose was carried out included the following:

1. It was part of the conspiracy that the defendants would and did play different roles, take upon themselves different tasks and participate in the affairs of the conspiracy through various criminal acts. The defendants would and did make themselves and their services available at various times throughout the conspiracy and would participate in selected drug trafficking ventures on an "as needed" basis. The roles assumed by these defendants were interchangeable at various times throughout the conspiracy. Some of the roles which the defendants assumed and carried out include, among others: financier, organizer, manager, truck driver, distributor, stashhouse sitter and currency courier.

2. It was further part of the said conspiracy that each defendant would commit and aid and abet in the commission of criminal offenses involving the knowing and intentional distribution and possession with intent to distribute controlled substances, namely marijuana and hashish, in violation of Title 21, United States Code, Section 841(a) and Title 18, United States Code, Section 2.

3. It was further part of the said conspiracy that the defendants and others known and unknown to the Grand Jury, would and did travel and cause others to travel in interstate and foreign commerce to facilitate the distribution of drugs, the laundering of drug money and the investment of drug monies into business enterprises which would and did affect interstate and foreign commerce and did attempt to promote and carry on such activity.

4. It was further part of the said conspiracy that the defendants CHRIS RECKMEYER, ROBERT RECKMEYER, SCOTT JOHNSON and others known and unknown to the Grand Jury would and did transport monetary instruments in an amount exceeding $5,000 into and out of the United States of America without filing a Report of International Transportation of Currency as required by law.

5. It was further part of the said conspiracy that the defendants and unindicted co-conspirators would and did transport the marijuana and hashish to various "stash" houses in the Eastern District of Virginia and elsewhere, where the marijuana and hashish would be stored pending its distribution.

6. It was further part of the said conspiracy that the defendants ROBERT RECKMEYER, GREG JARRETT, SCOTT JOHNSON, CARL MEYERS and others known and unknown to the Grand Jury would and did possess and transfer unregistered firearms, that is machine guns and silencers.

7. It was further part of the said conspiracy that the defendants and unindicted co-conspirators would and did derive substantial gross receipts from their unlawful activities, that is, in excess of approximately one hundred million dollars ($100,000,000).

8. It was further part of the said conspiracy that the defendants and unindicted co-conspirators would and did establish and utilize businesses ostensibly involved in the sale of rugs, gemstones, jewelry, gold, silver and other products in order to facilitate their unlawful drug activities by: a) using the business structure to camouflage and to disguise drug derived proceeds; b) using drug derived proceeds to obtain business products; c) using business products in exchange for drugs; d) using business products to conceal the transportation of drugs and drug related monies from detection by law enforcement authorities; e) using false sales invoices of the defendants' and unindicted co-conspirators' business entities to disguise the transfer of drug purchase monies and proceeds to and from each other; and f) over-stating the gross receipts of the defendants' and unindicted co-conspirators' various business entities in order to launder the proceeds they derived from drug trafficking and to provide seemingly legitimate sources of income to the defendants and unindicted co-conspirators.

9. It was further part of the said conspiracy that defendant ROBERT RECKMEYER and others known and unknown to the Grand Jury, would endeavor to continue their illegal drug activities by attempting to influence, obstruct and impede the due administration of justice through the intimidation of witnesses.

10. It was further part of the said conspiracy that defendant ROBERT RECKMEYER and others known and unknown to the Grand Jury, would endeavor to continue their illegal drug activities by suborning and procuring the perjury of witnesses who testified before the Grand Jury.

11. It was further part of the said conspiracy that the defendants and unindicted co-conspirators would and did use various methods to conceal the conspiracy and their unlawful drug activities in order to insure the conspiracy's continuing existence and success, including but not limited to: using large amounts of currency and currency equivalents to finance their unlawful drug activities; using aliases, false names, fictitious identities; using pay telephones, telephone answering services and unlisted toll free telephone numbers to avoid detection by law enforcement authorities; providing monies for bail bonds and legal fees for members of the conspiracy who were arrested; and corruptly influencing persons not to testify against the defendants and unindicted co-conspirators.

OVERT ACTS

In furtherance of the said conspiracy and to effect the objects thereof, the defendants and unindicted co-conspirators performed overt acts in the Eastern District of Virginia and elsewhere, including but not limited to the following:

1. In or about late 1974, in Montgomery County, Maryland, defendant ROBERT RECKMEYER distributed 50–100 pound quantities of marijuana on several occasions each month.

2. In or about 1975, in Montgomery County, Maryland, defendant ROBERT RECKMEYER distributed 50–100

pound quantities of marijuana on serveral occasions each month.

3. In or about late 1975, in LaPlata and Accokeek, Maryland, defendants CHRIS RECKMEYER and ROBERT RECKMEYER each possessed approximately 300 pounds of marijuana.

4. In or about late 1975, defendant CHRIS RECKMEYER caused marijuana to be transported from Arizona to Centreville, Virginia in the Eastern District of Virginia and Silver Spring, Maryland.

5. In or about 1976, in Maryland, defendant PATRICIA RECKMEYER collected monies from the sale of marijuana.

6. In or about 1976, defendant CHRIS RECKMEYER caused in excess of 10,000 pounds of marijuana to be transported from Arizona to Centreville, Virginia in the Eastern District of Virginia and Silver Spring, Maryland.

7. In or about November 1977, in Davie, Florida, defendant CHRIS RECKMEYER caused defendant STEVE WORTH to purchase approximately 5,000 pounds of marijuana.

8. On or about December 29, 1977, in the area of Panama City, Florida, defendant CHRIS RECKMEYER caused defendant STEVE WORTH to purchase approximately 15,000 pounds of marijuana offloaded from the vessel "Tanila".

9. On or about January 31, 1978, at Ft. Walton Beach and Madison County, Florida and Dothan, Alabama, defendant CHRIS RECKMEYER caused defendant STEVE WORTH to purchase for subsequent distribution in the Eastern District of Virginia and elsewhere, approximately 15,000 pounds of marijuana offloaded from the vessel "Navigator".

10. In or about March 1978, in Perry, Florida, defendants CHRIS RECKMEYER and STEVE WORTH and unindicted co-conspirator Clyde W. Cobb had a meeting to discuss payment for marijuana.

11. In or about March 1978, in Perry, Florida, defendants CHRIS RECKMEYER and STEVE WORTH paid unindicted co-conspirator Clyde W. Cobb approximately $250,000 in U.S. currency.

12. On or about April 26, 1978, defendant ROBERT RECKMEYER caused the incorporation of United Trade, Inc. in the State of Maryland.

13. On or about July 27, 1978, defendant CHRIS RECKMEYER caused the incorporation of Organic Foods, Inc. in Gainesville, Florida.

14. In or about late 1978 or early 1979, in the area of Miami, Florida, defendant CHRIS RECKMEYER caused STEVE WORTH to deliver oriental rugs to unindicted co-conspirator Clyde W. Cobb as partial payment for marijuana which said defendants had previously received from Cobb.

15. In or about 1978, defendant STEVE WORTH discussed with unindicted co-conspirator Clyde W. Cobb the establishment of a rug business to launder and conceal income from drug trafficking.

16. In or about 1978, defendant ROBERT RECKMEYER discussed with an unindicted co-conspirator the creation of false sales invoices for "Robert Bruce Products" and/or "United Trade, Inc." to reflect sales of products which did not occur.

17. In or about 1978, defendant ROBERT RECKMEYER created false sales invoices for "Robert Bruce Products" and "United Trade, Inc." which invoices overstated and inflated the price of products sold to unindicted co-conspirators.

18. On or about March 1, 1978, in Perry, Florida and Madison County, Florida, defendant CHRIS RECKMEYER caused defendant STEVE WORTH to purchase approximately 15,000 pounds of marijuana.

19. In or about mid-March 1978, in Perry, Florida and Madison County, Florida, defendant CHRIS RECKMEYER caused defendant STEVE WORTH to purchase approximately 14,000 pounds of marijuana.

20. In or about April 1978, in Perry, Florida, Tallahassee, Florida and Madison County, Florida, defendant CHRIS RECKMEYER caused defendant STEVE WORTH to purchase approximately 20,000 pounds of marijuana offloaded from the vessel "Miss Too Nicey".

21. In or about July 1978, at Gasden County, Florida, defendant CHRIS RECKMEYER caused defendant STEVE WORTH to purchase approximately 10,000–15,000 pounds of marijuana.

22. In or about October 1978, at Great Falls, Virginia, in the Eastern District of Virginia, defendant ROBERT RECKMEYER purchased approximately 1,000 pounds of marijuana from unindicted co-conspirators.

23. In or about fall 1978, defendant ROBERT RECKMEYER instructed an unindicted co-conspirator to pay for marijuana received from ROBERT RECKMEYER by purchasing cashier's checks made payable to ROBERT RECKMEYER's business known as "United Trade, Inc." doing business as "East West Design".

24. On or about November 15, 1978, in Arlington, Virginia, in the Eastern District of Virginia, an unindicted co-conspirator using an alias purchased a cashier's check for $5,054.40 made payable to "East West Design" as partial payment for marijuana received from defendant ROBERT RECKMEYER.

25. In or about December 1978, at Springfield, Virginia, in the Eastern District of Virginia, defendant ROBERT RECKMEYER purchased approximately 5,000 pounds of marijuana offloaded from the vessel "Free Spirit" (a/k/a Green Sea).

26. In or about December 1978, at a marijuana stashhouse on Hooes Road in Springfield, Virginia, in the Eastern District of Virginia, defendant ROBERT RECKMEYER paid approximately $1,000,000 in U.S. currency to an unindicted co-conspirator for the marijuana offloaded from the vessel "Free Spirit".

27. In or about 1979, defendant ROBERT RECKMEYER created false sales invoices for "United Trade, Inc."

which invoices overstated and inflated the price of products sold to unindicted co-conspirators.

28. In or about January 1979, at the Oak Lee Farm in Leesburg, Virginia, in the Eastern District of Virginia, defendant ROBERT RECKMEYER purchased approximately 7,000–8,000 pounds of marijuana.

29. In or about January 1979, in Loudoun County, Virginia, in the Eastern District of Virginia, defendant ROBERT RECKMEYER paid approximately $750,000 in U.S. currency to an unindicted co-conspirator for the marijuana ROBERT RECKMEYER had purchased at Oak Lee Farm.

30. On or about January 26, 1979, defendant CHRIS RECKMEYER caused the incorporation of Crancy's Inc., in Gainesville, Florida.

31. In or about early 1979, in Waycross, Georgia and Brunswick, Georgia, defendant CHRIS RECKMEYER caused an unindicted co-conspirator to transport gold, jewelry and coins valued at approximately $500,000 in order to make a partial payment for approximately 24,000 pounds of marijuana.

32. In or about spring 1979, in Beaumont, Texas, defendant CHRIS RECKMEYER and unindicted co-conspirator Robert Govern caused defendant TOM TUCKER to distribute approximately 1,700 pounds of marijuana to CHRIS RECKMEYER.

33. In or about spring 1979, in Beaumont, Texas, defendant CHRIS RECKMEYER paid for marijuana by causing defendant CHRIS ROBERTSON to deliver approximately $250,000 in U.S. currency to defendant TOM TUCKER and an unindicted co-conspirator.

34. On or about August 10, 1979, in Winter Park, Florida, defendant CHRIS RECKMEYER cuased "G & M Investment Enterprises, Inc." invoices to be created which reflected that defendant CHRIS RECKMEYER's corporation, "Crancy's", had purchased approximately 10,864.4 grams of gold for $108,644.

35. In or about April 1979, in Altha, Florida, defendant CHRIS RECKMEYER caused defendant STEVE WORTH to purchase approximately 15,000 pounds of marijuana off-loaded from the vessels "Carol B" and "Miss Susan".

36. On or about July 4, 1979, at Falmouth, Massachusetts, defendant ROBERT RECKMEYER purchased approximately 3,000–4,000 pounds of marijuana from defendant LEE HARVEY and an unindicted co-conspirator.

37. On or about July 18–24, 1979, at Fairfax Station, Virginia, in the Eastern District of Virginia, defendant ROBERT RECKMEYER purchased approximately 6,000 pounds of marijuana off-loaded from the vessel "Dodeskaden".

38. In or about mid-1979, at the "United Trade, Inc." warehouse in Merrifield, Virginia, in the Eastern District of Virginia, defendant ROBERT RECKMEYER delivered two oriental rugs valued at $2,300 to an unindicted co-conspirator as a partial payment for marijuana which ROBERT RECKMEYER had previously received.

39. In or about September 1979, in Fairfax County, Virginia, in the Eastern District of Virginia, defendant ROBERT RECKMEYER caused defendant TIM RUDDY and unindicted co-conspirators to transport to Louisiana approximately two boxes, each containing approximately $500,000 in U.S. currency, for the purpose of purchasing marijuana.

40. In or about September 1979, in New Orleans, Louisiana, defendant CHRIS RECKMEYER caused an unindicted co-conspirator to possess approximately $500,000 in U.S. currency for the purpose of purchasing marijuana.

41. In or about September 1979, in New Orleans, Louisiana and Northern Virginia, in the Eastern District of Virginia, defendant PATRICIA RECKMEYER caused an unindicted co-conspirator to transport approximately $500,000 in U.S. currency.

42. In or about December 1979, at Jasper, Texas, defendant CHRIS RECKMEYER purchased approximately

5,000-6,000 pounds of marijuana and caused said marijuana to be transported by unindicted co-conspirators.

43. On or about December 17, 1979, defendant CHRIS RECKMEYER travelled from the Washington National Airport, in the Eastern District of Virginia, to West Palm Beach, Florida to deliver approximately $500,000 in U.S. currency to defendant TOM TUCKER for the marijuana which CHRIS RECKMEYER had purchased from TOM TUCKER in Jasper, Texas.

44. On or about December 20, 1979, in Winter Park, Flroida, defendant CHRIS RECKMEYER caused an invoice to be created by "G & M Investment Enterprises" reflecting that CHRIS RECKMEYER had purchased approximately 6,777.8 grams of gold for $145,722.70.

45. On or about December 21, 1979, in Elizabeth City, North Carolina, defendant CHRIS RECKMEYER caused an unindicted co-conspirator to purchase approximately 8,500 pounds of marijuana which CHRIS RECKMEYER then caused to be transported by defendants TONY SWEENEY and DON SHIPLEY for subsequent distribution by defendants GREG JARRETT and STEVE WORTH.

46. On or about December 21, 1979, in Northern Virginia, in the Eastern District of Virginia, defendants STEVE WORTH and GREG JARRETT delivered U.S. currency to an unindicted co-conspirator as a partial payment for the 8,500 pounds of marijuana purchased by defendant CHRIS RECKMEYER.

47. In or about late 1979 or early 1980, at Berkeley Springs, West Virginia, defendant JAN GILLIE distributed approximately 20 pounds of hashish to an unindicted co-conspirator.

48. In or about 1980, defendant ROBERT RECKMEYER created false sales invoices for "United Trade, Inc." which invoices overstated and inflated the price of products sold to unindicted co-conspirators.

49. During a two week period in or about January 1980, in Warrenton and Loudoun County, Virginia, in the East-

ern District of Virginia, defendant ROBERT RECKMEYER received approximately 10,000 pounds of marijuana.

50. On or about January 11, 1980, in Loudoun County, Virginia, in the Eastern District of Virginia, defendant TOM ASHTON registered at the Dulles Holiday Inn hotel.

51. On or about January 11-13, 1980, in Loudoun County, Virginia, in the Eastern District of Virginia, defendant ROBERT RECKMEYER caused defendants CHRIS ROBERTSON and TOM ASHTON to transport approximately 2,000 pounds of marijuana for subsequent distribution.

52. In or about early 1980, in Fairfax County, Virginia, in the Eastern District of Virginia, defendant ROBERT RECKMEYER delivered a silk rug valued at approximately $7,000 to an unindicted co-conspirator as a partial payment for marijuana which ROBERT RECKMEYER had previously received from the unindicted co-conspirator.

53. In or about late January 1980, in Northern Virginia, in the Eastern District of Virginia, defendant ROBERT RECKMEYER paid approximately $750,000 in U.S. currency to an unindicted co-conspirator as a partial payment for the 10,000 pounds of marijuana purchased at Warrenton and Loudoun County, Virginia.

54. In or about 1980, at Luray and Berryville, Virginia, defendants ROBERT RECKMEYER and TONY SWEENEY caused an unindicted co-conspirator to transport in excess of 200 pounds of marijuana.

55. On or about February 12, 1980, in Northern Virginia, in the Eastern District of Virginia, defendants STEVE WORTH and GREG JARRETT delivered approximately $250,000 in U.S. currency to an unindicted co-conspirator as a partial payment for marijuana purchased by CHRIS RECKMEYER.

56. In or about February or March 1980, at Jasper, Texas, defendant CHRIS RECKMEYER purchased ap-

proximately 4,000–5,000 pounds of marijuana from defendant TOM TUCKER.

57. On or about March 7, 1980, at Slidell, Louisiana, defendant CHRIS RECKMEYER purchased approximately 8,000 pounds of marijuana for which CHRIS RECKMEYER caused approximately $930,000 in U.S. currency to be transported to Louisiana.

58. In or about March 1980, in Leesburg, Virginia, in the Eastern District of Virginia, defendant ROBERT RECKMEYER purchased approximately 9,000 pounds of marijuana.

59. On or about March 8, 1980, in Northern Virginia, in the Eastern District of Virginia, defendants STEVE WORTH and GREG JARRETT delivered approximately $215,000 in U.S. currency to an unindicted co-conspirator as a partial payment for marijuana purchased by defendant CHRIS RECKMEYER.

60. On or about April 3, 1980 and April 14, 1980, at Winter Park, Florida, defendant CHRIS RECKMEYER caused invoices to be created by "G & M Investment Enterprises, Inc." reflecting that defendant CHRIS RECKMEYER'S corporation, "Crancy's, Inc." had purchased approximately 7,033.5 grams of gold for $140,670.

61. In or about spring 1980, in Fairfax County, Virginia, in the Eastern District of Virginia, defendant ROBERT RECKMEYER delivered approximately 2,000 ounces of silver dollars to an unindicted co-conspirator as a $52,000 partial payment for marijuana and/or hashish which ROBERT RECKMEYER has previously received from said unindicted co-conspirator.

62. In or about summer 1980, in Miami, Florida, defendant CHRIS RECKMEYER caused an unindicted co-conspirator to transport approximately $500,000 worth of gold, jewelry, coins and rugs in order to make a downpayment for marijuana.

63. In or about June 1980, at Hilton Head, Beaufort County and Hardeeville, South Carolina, defendant ROBERT RECKMEYER purchased approximately 13,000

pounds of hashish from defendant LEE HARVEY and an unindicted co-conspirator, and ROBERT RECKMEYER caused the hashish to be transported on Interstate Highway 95 through North Carolina, Northern Virginia and Maryland.

63a. In or about June 1980, at Hilton Head, South Carolina, defendant ROBERT RECKMEYER delivered two suitcases containing a total of approximately $1,775,000 in U.S. currency to an unindicted co-conspirator as partial payment for the hashish ROBERT RECKMEYER had received.

63b. On or about June 10, 1980, defendant CHRIS RECKMEYER caused "The Royal Stone Corporation", of which defendant PAT HENDRY was president, to create sales invoice number 501 reflecting the sale of a 5.54 carat emerald to defendant CHRIS RECKMEYER'S corporation, "Crancy's, Inc.", for $120,000.

63c. On or about June 14, 1980, defendant CHRIS RECKMEYER caused "Crancy's, Inc." sales invoice number 00682 to be created reflecting the sale of a 5.54 carat African emerald for $140,000 to "United Trade Inc.".

63d. On or about June 14, 1980, at the "United Trade, Inc." warehouse in Merrifield, Virginia, in the Eastern District of Virginia, defendant ROBERT RECKMEYER delivered a 5.54 carat African emerald to an unindicted co-conspirator as a $175,000 partial payment for the 13,000 pounds of hashish which ROBERT RECKMEYER had purchased at Hilton Head, Beaufort County and Hardeeville, South Carolina.

63e. On or about June 14, 1980, defendant ROBERT RECKMEYER caused "United Trade Inc." sales invoice number 5190 to be created reflecting the sale of a 5.54 carat African emerald to an unidentified customer for $174,720 in cash.

63f. On or about June 17, 1980, defendant CHRIS RECKMEYER caused "The Royal Stone Corporation", of which defendant PAT HENDRY was president, to create sales invoice number 504 reflecting the sale of a 6.08 carat ruby to defendant CHRIS RECKMEYER'S corporation, "Crancy's, Inc.", for $143,000.

63g. On or about June 17, 1980, defendant CHRIS RECKMEYER caused "Crancy's, Inc." sales invoice number 00694 to be created reflecting the sale of a 6.08 carat red Thailand ruby to an unidentified customer for $234,000, of which $180,000 was paid in cash and a balance of $54,000 was due.

63h. On or about June 17, 1980, at the "United Trade, Inc." warehouse in Merrifield, Virginia, in the Eastern District of Virginia, defendant ROBERT RECKMEYER delivered a 6.08 carat red Thailand ruby to an unindicted co-conspirator as a $210,000 partial payment for the 13,000 pounds of hashish which ROBERT RECKMEYER had purchased at Hilton Head, Beaufort County and Hardeeville, South Carolina.

63i. On or about June 24, 1980, defendant CHRIS RECKMEYER caused "The Royal, Stone Corporation", of which defendant PAT HENDRY was president, to create sales invoice number 506 reflecting the sale of an 8.13 carat ruby to defendant CHRIS RECKMEYER'S corporation, "Crancy's, Inc.", for $200,000.

63j. On or about June 24, 1980, defendant CHRIS RECKMEYER caused "Crancy's, Inc." sales invoice number 00698 to be created reflecting the sale of an 8.13 carat red Thailand ruby to defendant ROBERT RECKMEYER'S corporation, "United Trade, Inc.", for $225,000 in cash.

63k. On or about June 24, 1980, at the "United Trade, Inc." warehouse in Merrifield, Virginia, in the Eastern District of Virginia, defendant ROBERT

RECKMEYER delivered an 8.13 carat red Thailand ruby to an unindicted co-conspirator as a $280,000 partial payment for the 13,000 pounds of hashish which ROBERT RECKMEYER had purchased in Hilton Head, Beaufort County and Hardeeville, South Carolina.

631. On or about June 24, 1980, defendant ROBERT RECKMEYER caused "United Trade, Inc." sales invoice number 5183 to be created reflecting the sale of an 8.13 carat red Thailand ruby to an unidentified customer for $280,800 in cash.

64. On or about June 17, 1980, at a marijuana stashhouse on Compton Road in Fairfax County, Virginia, in the Eastern District of Virginia, defendant ROBERT RECKMEYER purchased approximately 3,500 pounds of marijuana which he caused to be transported by unindicted co-conspirators.

65. In or about June 1980, at the "Crancy's, Inc." warehouse in Fairfax County, Virginia, in the Eastern District of Virginia, an unindicted co-conspirator delivered approximately $10,000–$12,000 in U.S. currency to defendant CHRIS RECKMEYER as partial payment for marijuana that had been distributed by CHRIS RECKMEYER.

66. On or about July 28, 1980, defendant CHRIS RECKMEYER caused the incorporation of "Crancy's, Inc." in the Eastern District of Virginia.

67. In or about October 1980, at Edisto Island, South Carolina, defendant ROBERT RECKMEYER purchased approximately 4,000–5,000 pounds of marijuana, approximately 500 pounds of which defendant CARL MEYERS transported to an unindicted co-conspirator in Fairfax County, Virginia in the Eastern District of Virginia.

68. On or about October 21, 1980, defendant CHRIS RECKMEYER caused the incorporation of "Unlimited Investments, Inc." in the Eastern District of Virginia.

69. On or about October 18–22, 1980, at Warrenton, Fairfax County and Rappahannock County, Virginia, in the Eastern District of Virginia, defendant CHRIS RECK-

MEYER sold approximately 700 pounds of hashish to defendant TOM TUCKER which was then transported and stored by defendant DAVID COOK.

70. In or about October 1980, at the "Crancy's Inc." warehouse in Fairfax County, Virginia, in the Eastern District of Virginia, an unindicted co-conspirator delivered approximately $50,000–$60,000 in U.S. currency to defendant CHRIS RECKMEYER as partial payment for the 700 pounds of hashish which defendant TUCKER had purchased from CHRIS RECKMEYER.

71. In or about October 1980, at the "Crancy's Inc." warehouse in Fairfax County, Virginia, in the Eastern District of Virginia, defendants CHRIS RECKMEYER and ROBERT RECKMEYER discussed the quality of marijuana which had been purchased by ROBERT RECKMEYER.

72. In or about November 1980, defendant CHRIS RECKMEYER caused false "Crancy's Inc." sales invoice number 0071 dated September 23, 1980 in the amount of $10,000 and false "Crancy's Inc." sales invoice number 00795 dated October 27, 1980 in the amount of $10,500 to be created reflecting the sale of rugs and silk tapestries which never occurred.

73. In or about 1981, defendant ROBERT RECKMEYER created false sales invoices for "United Trade, Inc." which invoices overstated and inflated the price of products sold to unindicted co-conspirators.

74. In or about early 1981, in LaPlata and Accokeek, Maryland, defendant ROBERT RECKMEYER caused an unindicted co-conspirator to pick up from and/or deliver marijuana and hashish to defendant BRUCE THOMASON.

75. In or about 1981, in Union Bridge, Maryland, defendant ROBERT RECKMEYER caused an unindicted co-conspirator to deliver in excess of 100 pounds of marijuana and hashish to defendant JIM ADAMS.

76. In or about early 1981, at or near Springfield, Virginia, in the Eastern District of Virginia, defendant

ROBERT RECKMEYER introduced defendant SAL VASTOLA to an unindicted co-conspirator.

77. In or about February 1981, in Lake Tahoe, California, and in the area of Denver and Boulder, Colorado, defendant ROBERT RECKMEYER caused an unindicted co-conspirator to transport approximately 1,200 pounds of marijuana, 600 pounds of which was delivered to defendant JAN GILLIE and 600 pounds of which was delivered to defendant CRAIG SMITH.

78. On or about April 8, 1981, in San Carlos, California, defendant CHRIS RECKMEYER caused false "Crancy's Inc." sales invoice number 00831, dated December 11, 1980 to be created reflecting the sale of rugs valued at $2,240 to "Cultural Evolutions".

79. In or about spring of 1981, at Norfolk and Goochland County, Virginia, within the Eastern District of Virginia, defendant ROBERT RECKMEYER possessed approximately 10,000 pounds of marijuana which ROBERT RECKMEYER caused to be transported in approximately 7 trucks from a stashhouse in Goochland County, Virginia.

80. In or about spring 1981, at Tyson's Corner, Virginia, in the Eastern District of Virginia, defendant ROBERT RECKMEYER delivered a sapphire gemstone to an unindicted co-conspirator as a $20,000 partial payment for marijuana and/or hashish which the ROBERT RECKMEYER had previously received.

81. On or about June 2-3, 1981, defendant ROBERT RECKMEYER transported more than $5,000 in monetary instruments from Washington National Airport in the Eastern District of Virginia and Miami, Florida in the United States of America to Nassau, Bahamas.

82. On or about July 14, 1981, defendant ROBERT RECKMEYER caused the creation of a false "United Trade, Inc." sales invoice reflecting the sale of two sapphires to "Sanders and Associates, Inc." for $11,020 in cash.

83. On or about August 10, 1981, in Gaithersburg, Maryland and Vienna, Virginia, in the Eastern District of Virginia, defendant ROBERT RECKMEYER caused an unindicted co-conspirator to wire transfer to ROBERT RECKMEYER under the name "United Trade, Inc.", $11,020—the same amount as the false July 14, 1981 "United Trade, Inc." invoice—and, in turn, ROBERT RECKMEYER deducted $11,020 from the drug debt which the unindicted co-conspirator owed ROBERT RECKMEYER for marijuana and hashish.

84. On or about July 18, 1981, defendant ROBERT RECKMEYER caused the creation of a false "United Trade, Inc." sales invoice reflecting the sale of three silk rugs to "Sanders & Associates, Inc." for $21,000 in cash.

85. In or about September 1981, at Union Bridge, Maryland, defendant SAL VASTOLA obtained approximately 500–600 pounds of hashish from an unindicted coconspirator.

86. On or about October 14, 1981, in Gaithersburg, Maryland and Washington, D.C., defendant ROBERT RECKMEYER caused an unindicted co-conspirator to wire transfer to ROBERT RECKMEYER under the account name "United Trade, Inc.", $21,000—the same amount as the false July 18, 1981 "United Trade, Inc." invoice—and, in turn, ROBERT RECKMEYER deducted $21,000 from the drug debt which the unindicted co-conspirator owed ROBERT RECKMEYER for marijuana and hashish.

87. On or about October 22, 1981, in Gaithersburg, Maryland and Markham, Virginia, in the Eastern District of Virginia, defendant ROBERT RECKMEYER caused an unindicted co-conspirator to purchase two $9,000 cashier's checks made payable to the Internal Revenue Service with drug proceeds and to deliver said cashier's checks to defendant PATRICIA RECKMEYER for payment of the Ferderal income tax liabilities of ROBERT and PATRICIA RECKMEYER for the calendar year 1980.

88. In or about late November 1981, at Goochland County, Virginia, in the Eastern District of Virginia, and elsewhere, defendant ROBERT RECKMEYER purchased approximately 3,500 pounds of hashish.

89. In or about early 1982 in LaPlata and Accokeek, Maryland, defendant ROBERT RECKMEYER caused an unindicted co-conspirator to pick up from and/or deliver marijuana and hashish to defendant BRUCE THOMASON.

90. In or about 1982, at Gaithersburg, Maryland, defendant ROBERT RECKMEYER caused an unindicated co-conspirator to deliver approximately $10,000–$20,000 in U.S. currency to defendant JAN GILLIE.

91. In or about 1982, in Savannah, Georgia and Jacksonville and Miami, Florida, defendant ROBERT RECKMEYER caused an unindicted co-conspirator to deliver U.S. currency to defendant Lee Harvey.

92. In or about January 1982, at Hancock and Libertytown, Maryland, defendant ROBERT RECKMEYER caused an unindicted co-conspirator to deliver approximately $5,000–$10,000 in U.S. currency to defendant RICHARD VAUGHN as partial payment for approximately 1,000 pounds of hashish which RICHARD VAUGHN distributed to the unindicted co-conspirator.

93. In or about early 1982, in Loudoun County, Virginia, in the Eastern District of Virginia, defendant ROBERT RECKMEYER caused defendant TOM ASHTON to deliver approximately 360 pounds of hashish to an unindicted co-conspirator.

94. In or about early 1982, in Caroline County, Virginia, in the Eastern District of Virginia, defendant ROBERT RECKMEYER caused an unindicted co-conspirator to deliver in excess of 1,200 pounds of hashish to defendant FRANKIE NASTA.

95. On or about June 26, 1982, at Gaithersburg, Maryland, defendant GREG JARRETT picked up approximately 400–600 pounds of marijuana from an unindicted co-conspirator.

96. In or about July 1982, at Sag Harbor, New York, defendants, CHRIS RECKMEYER and WILLIAM SHARPE caused defendant CHARLES FRIEND to import approximately 24,000 pounds of marijuana into the United States at Sag Harbor, New York, for which marijuana defendant CHRIS RECKMEYER made a downpayment to defendant WILLIAM SHARPE of approximately $2,000,000 in U.S. currency.

97. In or about July 1982, at the Alta Vista farm in New Windsor, Maryland, and elsewhere within the Eastern District of Virginia, defendants CHRIS RECKMEYER and WILLIAM SHARPE, caused approximately 12 oriental rugs and 800 pounds of the marijuana imported at Sag Harbor, New York to be distributed to an unindicted co-conspirator.

98. In or about July 1982, at Accokeek, Maryland, defendant BRUCE THOMASON stored approximately 20,000 pounds of marijuana.

99. On or about July 27, 1982, defendant ROBERT RECKMEYER caused the incorporation of Atlantis Stone Corporation in the State of Delaware.

100. On or about August 3, 1982, defendant CHRIS RECKMEYER caused the incorporation of B.C.P., Inc. in the State of California.

101. In or about November and December 1982, in San Francisco, California, defendant CHRIS RECKMEYER caused an unindicted co-conspirator to create false "B.C.P., Inc." sales invoices reflecting cash sales to unidentified customers.

102. In or about November 1982, at Thankgiving, in Atlanta, Georgia and Blacksburg, Virginia, defendant ROBERT RECKMEYER caused defendant DON SHIPLEY and an unindicted co-conspirator to transport approximately 2,000–2,400 pounds of marijuana from Atlanta, Georgia to Blacksburg, Virginia.

103. In or about December 1982, in San Francisco, California, defendant CHRIS RECKMEYER caused false "Crancy's, Inc." sales invoice number 00854 dated Janu-

ary 27, 1981 in the amount of $10,000; and false "Crancy's, Inc." sales invoice number 00855 dated January 29, 1981 in the amount of $7,093, to be created reflecting the sale of rugs and gemstones to "Cultural Evolutions".

104. In or about 1983, in San Francisco, California, defendant CHRIS RECKMEYER caused an unindicted co-conspirator to create false "B.C.P., Inc." sales invoices reflecting cash sales to unidentified customers.

105. In or about early 1983 in LaPlata and Accokeek, Maryland, defendant ROBERT RECKMEYER caused an unindicted co-conspirator to pick up from and/or deliver marijuana and hashish to defendant BRUCE THOMASON.

106. On or about February 9, 1983, in Beaufort County, South Carolina, defendants ROBERT RECKMEYER, LEE HARVEY, CARL MEYERS and GREG JARRETT caused in excess of 1,500 pounds of hashish to be transported on Interstate Highway 95 from Beaufort County, South Carolina through the Eastern District of Virginia to Gaithersburg, Maryland.

107. In or about early 1983, in Fairfax County, Virginia, in the Eastern District of Virginia, defendant FRANKIE NASTA delivered approximately 5–10 pounds of hashish to an unindicted co-conspirator.

108. In or about spring 1983, at Accokeek, Maryland, defendant BRUCE THOMASON caused an unindicted co-conspirator to distribute a total of approximately 2,000 pounds of marijuana and hashish to defendants PAT HENDRY and TIM RUDDY for subsequent transportation and distribution by said PAT HENDRY and TIM RUDDY.

109. In or about March 1983, in Miami, Florida, defendant ROBERT RECKMEYER caused an unindicted co-conspirator to deliver U.S. currency to defendant LEE HARVEY.

110. On or about August 16, 1983, at the Washington National Airport in Arlington, Virginia, in the Eastern

District of Virginia, defendants CHRIS RECKMEYER and BRUCE THOMASON had a meeting.

111. On or about August 16, 1983, at Washington National Airport in Arlington, Virginia, in the Eastern District of Virginia, an individual delivered approximately $3,000 in U.S. currency to defendant BRUCE THOMASON as a partial payment for marijuana BRUCE THOMASON had previously distributed to the individual.

112. On or about August 18, 1983, at the Perpetual American Federal Savings and Loan in Alexandria, Virginia, in the Eastern District of Virginia, defendant BRUCE THOMASON purchased a cashier's check with $9,000 in U.S. currency, using $2,900 of the $3,000 which had been delivered to BRUCE THOMASON on August 16, 1983, and caused the cashier's check to be made payable to defendant CHRIS RECKMEYER.

113. On or about August 18, 1983, in Manassas, Virginia, in the Eastern District of Virginia, defendant CHRIS RECKMEYER caused there $9,000 cashier's check purchased by defendant BRUCE THOMASON to be deposited into CHRIS RECKMEYER'S personal account at the First Virginia Bank.

114. On or about September 20, 1983, at Alexandria, Virginia in the Eastern District of Virginia, defendant BRUCE THOMASON received approximately 436.2 grams of marijuana from an individual which BRUCE THOMASON transported to defendant CHRIS RECKMEYER in the area of College Park, Maryland.

115. On or about October 3, 1983, defendant CHRIS RECKMEYER caused "Crancy's, Inc." sales invoice number 01651 to be created reflecting the sale of oriental rugs to defendant BRUCE THOMASON'S business, "Mainland Carpets" for $50,000 in cash.

116. On or about October 5, 1983, in Northampton County, Virginia, in the Eastern District of Virginia, defendants CARL MEYERS and TIM RUDDY delivered approximaterly $449,020 in U.S. currency to defendant BRUCE THOMASON.

117. On or about October 5, 1983, in Northampton County, Virginia, in the Eastern District of Virginia defendant BRUCE THOMASON delivered a box containing $449,020 in U.S currency to a Drug Enforcement Administration Special Agent working in an undercover capacity.

118. On or about October 5, 1983, in Northampton County, Virginia, in the Eastern District of Virginia defendant BRUCE THOMASON delivered a second box containing $402,590 in U.S. currency to a Drug Enforcement Administration Special Agent operating in an undercover capacity.

119. On or about October 5, 1983, in Northampton County, Virginia, in the Eastern District of Virginia defendant BRUCE THOMASON delivered approximately 32 oriental rugs to a Drug Enforcement Administration Special Agent acting in an undercover capacity, of which 22 oriental rugs had been purchased by defendant CHRIS RECKMEYER under the name "Crancy's, Inc."

120. On or about October 5, 1983, in Northampton County and Accomack County, Virginia, in the Eastern District of Virginia, defendant BRUCE THOMASON caused defendant DOUGLAS COCHRAN to possess approximately 2,186 pounds of marijuana.

121. In or about 1984, in San Francisco, California, defendant CHRIS RECKMEYER caused an unindicted coconspirator to create false "B.C.P., Inc." sales invoices reflecting cash sales to unidentified customers.

122. On or about August 2, 1984, defendant SCOTT JOHNSON transported approximately $100,000 in U.S. currency from a location outside of the United States into Miami, Florida.

(All in violation of Title 21, United States Code, Section 846.)

COUNT 2

THE GRAND JURY FURTHER CHARGES THAT:

A. During a period from in or about 1974 and continuously thereafter up to and including the date of the bring-

ing of this Indictment, in the Eastern District of Virginia and elsewhere, defendants CHRIS RECKMEYER, ROBERT RECKMEYER and BRUCE THOMASON, the defendants herein, unlawfully, willfully, intentionally and knowingly did engage in a continuing criminal enterprise, in that these three defendants did knowingly, willfully, intentionally and unlawfully violate Title 21, United States Code, Section 841(a)(1); such violations, including but not limited to those violations alleged in Counts 3, 4, 5, 6, 7, 8, 9, 10, 11, and 12 of this Indictment and which Counts are realleged and incorporated herein by reference as though fully set forth in this Count, were part of the continuing series of violations of Subchapter I and II of the Comprehensive Drug Abuse Control Act of 1970, Title 21, United States Code, Section 801 *et seq.*, undertaken by defendant CHRIS RECKMEYER, ROBERT RECKMEYER, and BRUCE THOMASON, in concert with at least five other persons with respect to whom defendants CHRIS RECKMEYER, ROBERT RECKMEYER and BRUCE THOMASON each occupied a position of organizer, supervisor and manager, and from which such continuing series of violations the said defendants obtained substantial income and resources.

B. *Forfeiture*

From their engagement in the aforesaid continuing criminal enterprise, the defendants CHRIS RECKMEYER, ROBERT RECKMEYER and BRUCE THOMASON shall forfeit to the United States any profits they obtained arising from their participation in the said enterprise and any of their interests in, claims against, and property and contractual rights of any kind which afforded a source of influence over said enterprise, including but not limited to the following:

1. Condominium Unit Number M-48 in Estate Questa Verde, lying and being in Estate Hermon Hill, Company Quarter, Christianstead, St. Croix, U.S. Virgin Islands. together with 1.22366 percent individual interest in the common areas and facilities so declared in the Declara-

tion of Condominium to be appurtenant to the above-described condominium unit; and all rental and lease income from condominium Unit Number M-48.

2. A parcel of land containing 675.49 acres, more or less, with all improvements, structures, livestock, machinery and appurtenances thereto, known as the "Shelburne Glebe" located on the southeast side of Road No. 729 approximately 4.5 miles southwest of Leesburg, in Mercer Magisterial District, Loudoun County, Virginia, and more particularly described in the deed recorded in Deed Book 769 beginning at page 03 in the land records of Loudoun County, Virginia.

3. A parcel of land containing 50.19 acres with all improvements, structures, machinery, livestock and appurtenances thereto, located on the northwest side of Road No. 797 approximately 4.5 miles southwest of Leesburg, Mercer Magisterial District, Loudoun County, Virginia, and more particularly described in the deed recorded in Deed Book 788 beginning at page 759 in the land records of Loudoun County, Virginia.

4. A parcel of land containing 10.0 acres, with all improvements, structures, machinery, livestock and appurtenances thereto, located on the northwest side of Road No. 797, Mercer Magisterial District, Loudoun County, Virginia, and more particularly described in Schedule A of the deed recorded in Deed Book 795 beginning at page 45 in the land records of Loudoun County, Virginia.

5. A parcel of land containing 146.2785 acres, with all improvements, structures, machinery, livestock and appurtenances thereto, located approximately three miles south of Hamilton, Blue Ridge Magisterial District, Loudoun County Virginia, and more particularly described in the deed recorded in Deed Book 805 beginning at page 336 in the land records of Loudoun County, Virginia and in a subsequent recording, as evidenced by the transfer of title to William J. Reckmeyer, Sr., father of Chris Reckmeyer, as recorded by deed in Deed Book 836 beginning

at page 184 in the land records of Loudoun County, Virginia.

6. A parcel of land containing 38.961 acres, with all improvements, structures, machinery, livestock and appurtenances thereto, located near Mt. Gilead in Mercer Magisterial District, Loudoun County, Virginia, and more particularly described by a plat and survey of J. Horace Jarrett, C.L.S., dated August 17, 1982, a copy of which is attached to the deed recorded in Deed Book 819 beginning at page 860 in the land records of Loudoun County, Virginia.

7. A parcel of land containing 32.632 acres, with all improvements, structures, machinery, livestock and appurtenances thereto, located near the northwest side of Franklin Gibson Road in the Eighth Election District of Anne Arundel County, Maryland and more particularly described in a legal description attached to the deed recorded in Deed Book 3466 beginning at page 253 among the land records of Anne Arundel County, Maryland and in a subsequent recording, as evidenced by the transfer of title to Jim Adams, brother-in-law of Robert Reckmeyer, as recorded in Deed Book 3466 beginning at page 253 in the land records of Anne Arundel County, Maryland.

8. Any and all precious metals owned by or held on behalf of CHRIS RECKMEYER, ROBERT RECKMEYER and/or BRUCE THOMASON and the business entities which they each control and/or in which they hold any interest, including but not limited to: gold and silver bullion and coins, Baht gold jewelry, gold Canadian maple leaf coins, gold Krugerrand coins, gold and silver chains, and gold and silver bracelets.

9. Any and all precious gemstones owned by or held on behalf of CHRIS RECKMEYER, ROBERT RECKMEYER and/or BRUCE THOMASON and the business entities which they each control and/or in which they hold any interest, including but not limited to: golden sapphires, Burma rubies, Thailand rubies, emeralds, tanzanites, pink sapphires, diamonds and pearls.

10. Any and all oriental carpets and/or rugs, silk tapestries and/or rugs, furniture, chests, antiques, and lamps owned by or held on behalf of CHRIS RECKMEYER, ROBERT RECKMEYER and/or BRUCE THOMASON and the business entities which they each control and/or in which they hold any interest.

11. A deposit of $2,500 held in escrow by Wellborn County Properties, Inc. for the purchase of 44.62 acres of land, including all improvements, located in Loudoun County, Virginia.

12. A January 6, 1984 promissory note payable to CHRIS RECKMEYER and Nancy Reckmeyer by William John Reckmayer, Sr. in the amount of $112,500 plus accrued interest.

13. All accounts receivable of CHRIS RECKMEYER payable by Michael J. Kapper.

14. Eight oriental carpets totalling 162 square feet belonging to CHRIS RECKMEYER and held on consignment by Brett C. Leavenworth in Tucson, Arizona.

15. Any and all stock, assets and inventory of Unlimited Investments, Inc., a corporation in the State of Virginia, including but not limited to, all accounts at any financial institutions, typewriters, scales, file cabinets, safes and oval carpet.

16. Any and all of the shareholder and ownership interest of CHRIS RECKMEYER and Nancy L. Reckmeyer in B.C.P., Inc., a corporation in the State of California.

17. Any and all stock, financial, or other ownership interest of CHRIS RECKMEYER in American Deli, Inc., a corporation in the State of Florida.

18. A November 1983 promissory note in the amount of $5,000 plus accrued interest payable to CHRIS RECKMEYER by Mark B. Newman, President of the American Deli, Inc.

19. Any and all stock, assets and inventory of Crancy's Inc., a corporation in the State of Virginia.

20. Any and all stock, assets and inventory of Organic Foods, Inc., a corporation in the State of Virginia.

21. Any and all stock, assets and inventory of Manpower Management, Inc., a corporation in the State of Virginia.

22. Any and all stock, assets and inventory of United Trade, Inc., a corporation in the State of Maryland, also doing business as "East West Design" in the State of Virginia.

23. Any and all stock, assets and inventory of Robert Bruce Products.

24. Any and all stock, assets and inventory of Atlantis Stone Corporation, a corporation in the State of Delaware.

25. Any and all stock, assets and inventory of Mainland Carpets, Inc., a corporation in the State of Virginia.

26. Any and all possessions of CHRIS RECKMEYER, ROBERT RECKMEYER and/or BRUCE THOMASON with a retail value of $1,000 or more, including but not limited to, furniture, musical instruments, appliances, carpets, electronic devices, art objects, and antiques; including but not limited to such possessions located at the "Shelburne Glebe" in Loudoun County, Virginia and at 12900 Westbrook Drive, in Centreville, Virginia.

27. A 1973 Mercedes-Benz four door sedan, vehicle identification number 11406012004068.

28. A 1974 Chevrolet two door coupe, vehicle identification number 1L57H4Y126501.

29. A 1976 Chrysler four door sedan, vehicle identification number CM41N6D164365.

30. A 1979 Ford Pickup Truck, vehicle identification number F26HEEJ3709.

31. A 1978 Chevrolet four door station wagon, vehicle identification number CCL168F203822.

32. A 1974 Cadillac four door sedan, vehicle identification number 6B69R4Q172668.

33. A 1979 Chevrolet station wagon, vehicle identification number CCS269F109212.

34. A 1984 Chevrolet station wagon, vehicle identification number 1G8GC26M5EF107085.

35. A 1976 Cadillac four door sedan, vehicle identification number 6B69S6Q215574.

36. A 1984 Chevrolet station wagon, vehicle identification number 1C8GK26M4EF107548.

37. A 1984 Mercedes Benz four door sedan, vehicle identification number WDBAB33A4EA038061.

38. A 1959 Mercedes Benz four door sedan, vehicle identification number 220S8513087.

39. Any and all personal and/or corporate ownership interest of CHRIS RECKMEYER, ROBERT RECKMEYER and/or BRUCE THOMASON in monies deposited by or on behalf of CHRIS RECKMEYER, ROBERT RECKMEYER and/or BRUCE THOMASON, and/or their corporations, to any and all personal and corporate pension plans, money purchase plans, Keogh plans, individual retirement accounts, annuity contracts or any other retirement or profit sharing funds including, but not limited to, the following:

a. Keogh Annuity Contracts numbers 4278206 and 4278207, each in the amount of $7,500, and any accrued interest, in the names of CHRIS RECKMEYER and Nancy Reckmeyer issued by the Franklin Life Insurance Company of Springfield, Illinois;

b. Sovran Bank account number 9381-2959 in the name of Crancy's, Inc. Money Purchase and Retirement Trust;

c. Sovran Bank account number 9381-2946 in the name of Crancy's, Inc., Profit Sharing and Retirement Trust;

d. Bank of New York account number S 063795054246 as agent for Merrill Lynch account number 795-05424 in the name of Unlimited Investments, Inc., Money Purchase Plan;

e. Bank of New York account number S 063795054253 as agent for Merrill Lynch account number 795-05425 in the name of Unlimited Investments, Inc., Profit Sharing Plan;

f. Calvert Group First Variable Rate Fund account number 113-061-6 in the name of United Trade, Inc., Profit Sharing Plan;

g. Calvert Group First Variable Rate Fund account number 113062-4 in the name of United Trade, Inc. Money Purchase Plan;

40. Any and all personal and/or corporate ownership interest of CHRIS RECKMEYER, ROBERT RECKMEYER and/or BRUCE THOMASON in any monies deposited by or on behalf of CHRIS RECKMEYER, ROBERT RECKMEYER or BRUCE THOMASON, and/or their corporations, in any safe deposit boxes and in any and all personal checking accounts, corporate checking accounts, savings accounts and any other accounts including, but not limited to, the following:

a. First Virginia Bank account number 8513-4120 in the name of CHRIS RECKMEYER and Nancy Reckmeyer;

b. First Virginia Bank account number 0716-1433 in the name of Crancy's, Inc.;

c. First Virginia Bank account number 0530-6728 in the name of Mainland Carpets, Inc.;

d. First Virginia Bank account number 8846-0312 in the name of BRUCE THOMASON and Marionlee Thomason;

e. First American Bank of Virginia account number 0624-4912 in the name of Unlimited Investments, Inc.;

f. First American Bank of Virginia account number 0649-9198 in the name of Manpower Management, Inc.;

g. Dominion National Bank of Virginia account number 4-250-280-1 in the name of Organic Foods, Inc.;

h. Riggs National Bank account number 08-392-168 in the name of Atlantis Stone Corporation;

i. Calvert Group First Variable Rate Fund account number 143-404-2-101 in the name of Atlantis Stone Corporation;

j. Calvert Group First Variable Rate Fund account number 001-001132786 in the name of ROBERT RECKMEYER;

k. Calvert Group First Variable Rate Fund account number 89251-3 in the name of United Trade, Inc.

41. Approximately $195,180.16, derived from the 1983 sale by ROBERT RECKMEYER and Patricia Reckmeyer of a parcel of real property and all appurtenances thereto, said property being known as "Gibraltar Farm" and containing approximately 176 acres located in Fauquier County, Virginia; all proceeds from the 1983 sale of said property and all accrued interest on the aforesaid $195,180.16 since its November 15, 1983 seizure by the United States of America.

(All in violation of Title 21, United States Code, Section 848.)

COUNT 3

THE GRAND JURY FURTHER CHARGES THAT:

On or about January 11-13, 1980, in Loudoun County, Virginia, within the Eastern District of Virginia, defendant ROBERT RECKMEYER CHRIS ROBERTSON and TOM ASHTON did knowingly, intentionally and unlawfully possess with intent to distribute approximately 2,000 pounds of marijuana, a Schedule I non-narcotic controlled substance.

(Violation of Title 21, United States Code, Section 841(a)(1): Title 18, United States Code, Section 2.)

COUNT 4

THE GRAND JURY FURTHER CHARGES THAT:

In or about March 1980, in Leesburg, Virginia, within the Eastern District of Virginia, defendants ROBERT RECKMEYER did knowingly, intentionally and unlawfully possess with intent to distribute approximately 8,500

pounds of marijuana, a Schedule I non-narcotic controlled substance.

(Violation of Title 21, United States Code, Section 841(a)(1): Title 18, United States Code, Section 2.)

COUNT 5

THE GRAND JURY FURTHER CHARGES THAT:

In or about June 1980, within the Eastern District of Virginia and elsewhere, defendant ROBERT RECKMEYER did knowingly, intentionally and unlawfully possess with intent to distribute in excess of 1,000 pounds of hashish, a Schedule I non-narcotic controlled substance.

(Violation of Title 21, United States Code, Section 841(a)(1): Title 18, United States Code, Section 2.)

COUNT 6

THE GRAND JURY FURTHER CHARGES THAT:

On or about June 17, 1980, in Fairfax County, Virginia, within the Eastern District of Virginia, defendant ROBERT RECKMEYER did knowingly, intentionally and unlawfully possess with intent to distribute approximately 3,500 pounds of marijuana, a Schedule I non-narcotic controlled substance.

(Violation of Title 21, United States Code, Section 841(a)(1); Title 18, United States Code, Section 2.)

COUNT 7

THE GRAND JURY FURTHER CHARGES THAT:

In or about October 1980, in Warrenton, Virginia, within the Eastern District of Virginia, defendants CHRIS RECKMEYER and THOMAS TUCKER did knowingly, intentionally and unlawfully possess with intent to distribute approximately 700 pounds of hashish, a Schedule I non-narcotic controlled substance.

(Violation of Title 21, United States Code, Section 841(a)(1); Title 18, United States Code, Section 2.)

COUNT 8

THE GRAND JURY FURTHER CHARGES THAT:

In or about spring of 1981, in Norfolk and Goochland County, Virginia, within the Eastern District of Virginia, defendants ROBERT RECKMEYER and LEE HARVEY did knowingly, intentionally and unlawfully possess with intent to distribute approximately 10,000 pounds of marijuana, a Schedule I non-narcotic controlled substance.

(Violation of Title 21, United States Code, Section 841(a)(1); Title 18, United States Code, Section 2.)

COUNT 9

THE GRAND JURY FURTHER CHARGES THAT:

In or about November 1981, the area of Norfolk and Goochland County, Virginia, within the Eastern District of Virginia, defendants ROBERT RECKMEYER did knowingly, intentionally and unlawfully possess with intent to distribute approximately 3,500 pounds of hashish, a Schedule I non-narcotic controlled substance.

(Violation of Title 21, United States Code, Section 841(a)(1); Title 18, United States Code, Section 2.)

COUNT 10

THE GRAND JURY FURTHER CHARGES THAT:

In or about July 1982, within the Eastern District of Virginia and elsewhere, defendants WILLIAM SHARPE, CHARLES FRIEND and CHRIS RECKMEYER did knowingly, intentionally and unlawfully possess with intent to distribute in excess of approximately 800 pounds of marijuana, a Schedule I non-narcotic controlled substance.

(Violation of Title 21, United States Code, Section 841(a)(1); Title 18, United States Code, Section 2.)

COUNT 11

THE GRAND JURY FURTHER CHARGES THAT:

On or about September 20, 1983, at Alexandria, Virginia in the Eastern District of Virginia, defendant BRUCE THOMASON did knowingly, intentionally and unlawfully

possess with intent to distribute approximately 436.2 grams of marijuana, a Schedule I non-narcotic controlled substance.

(Violation of Title 21, United States Code, Section 841(a)(1).)

COUNT 12

THE GRAND JURY FURTHER CHARGES THAT:

On or about October 5, 1983, in Northampton and Accomack County, within the Eastern District of Virginia, defendants CHRIS RECKMEYER, BRUCE THOMASON, DOUGLAS COCHRAN, CARL MEYERS, and TIM RUDDY did knowingly, intentionally and unlawfully possess with intent to distribute approximately 2,186 pounds of marijuana, a Schedule I non-narcotic controlled substance.

(Violation of Title 21, United States Code, Section 841(a)(1); Title 18, United States Code, Section 2.)

COUNT 13

THE GRAND JURY FURTHER CHARGES THAT:

From beginning in or about November 1981, the exact date being to the grand jury unknown, and continuously thereafter up to and including February 1984, in the Eastern District of Virginia and elsewhere, defendants ROBERT RECKMEYER, GREG JARRETT, SCOTT JOHNSON and CARL MEYERS did knowingly, willfully and unlawfully combine, conspire, confederate and agree with each other and with divers other persons, known and unknown to the grand jury, to commit the following offenses against the United States:

1. To knowingly and unlawfully possess firearms, that is, machine guns and silencers, none of which were registered to the defendants in the National Firearms Registration and Transfer Record, in violation of Title 26, United States Code, Section 5861(d).

2. To knowingly and unlawfully transfer firearms, that is, machine guns and silencers, without receiving an approved application as required under Title 26, United

States Code, Section 5812(a)(6), in violation of Title 26, United States Code, Section 5861(e).

3. To knowingly and unlawfully transfer firearms, that is, machine guns and silencers, to a person who was not licensed as an importer, manufacturer, dealer or collector of firearms and who did not reside in the same state as defendant ROBERT RECKMEYER in violation of Title 18, United States Code, Section 922(a)(5).

OVERT ACTS

In furtherance of the said conspiracy and to effect the objects thereof, the defendants and unindicted co-conspirators performed overt acts in the Eastern District of Virginia and elsewhere, including but not limited to the following:

1. In or about November 1981, in Fairfax County, Virginia, in the Eastern District of Virginia, Defendants ROBERT RECKMEYER, a resident of Virginia, and defendant GREG JARRETT possessed and transferred approximately fourteen firearms, that is, nine Israeli Military Industries Uzi 9mm machine guns and five silencers to an unindicted co-conspirator who then resided in Maryland.

2. In or about November 1981, defendant ROBERT RECKMEYER caused an unindicted co-conspirator to transport the said firearms from Fairfax County, Virginia, in the Eastern District of Virginia, to Frederick County, Maryland.

3. In or about November 1981, in Frederick County, Maryland, defendant ROBERT RECKMEYER caused an unindicted co-conspirator to transfer the said firearms to another unindicted co-conspirator.

4. In or about December 1981, in Frederick County, Maryland and elsewhere, defendant ROBERT RECKMEYER caused an unindicted co-conspirator to unlawfully transfer approximately three firearms, that is, two Israeli Military Industries, Uzi 9mm machine guns and one silencer to defendant CARL MEYERS.

5. In or about December 1981, in Frederick County, Maryland, defendant ROBERT RECKMEYER caused an unindicted co-conspirator to transport approximately seven firearms, that is, five Israeli Military Industries Uzi 9mm machine guns and two silencers to Boston, Massachusetts where the unindicted co-conspirator transferred said firearms to another unindicted co-conspirator.

6. In or about July 1983, at Gaithersburg, Maryland, defendants ROBERT RECKMEYER and SCOTT JOHNSON unlawfully transferred to an unindicted co-conspirator approximately three firearms, that is, an Israeli Military Industries Uzi 9mm machine gun and two R.P.B. Industries M-11 .380 caliber machine guns at least eight hundred rounds of 9mm ammunition.

7. In or about January 1984, in Warfordsburg, Pennsylvania, defendant ROBERT RECKMEYER caused defendant SCOTT JOHNSON to receive two firearms, that is, an Israeli Military Industries Uzi 9mm machine gun and an R.P.B. Industries M-11 .380 caliber machine gun from an unindicted co-conspirator.

(Violation of Title 18, United States Code, Section 371.)

COUNT 14

THE GRAND JURY FURTHER CHARGES THAT:

In or about November 1981, in Fairfax County, Virginia, within the Eastern District of Virginia, defendants ROBERT RECKMEYER and GREG JARRETT knowingly and unlawfully possessed approximately nine firearms, that is, nine Israeli Military Industries Uzi 9mm machine guns, one of said firearms bearing serial number SA01152, none of which firearms had been registered to ROBERT RECKMEYER or GREG JARRETT in the National Firearms Registration and Transfer Record as required by Title 26, United States Code, Sections 5841, 5845(a)(6), 5861(d).

(Violation of Title 26, United States Code, Sections 5861(d), 5871.)

COUNT 15

THE GRAND JURY FURTHER CHARGES THAT:

In or about November 1981, in Fairfax County, Virginia, within the Eastern District of Virginia, and elsewhere, defendants ROBERT RECKMEYER and GREG JARRETT knowingly and unlawfully possessed approximately five firearms, that is, five silencers, none of which firearms had been registered to said defendants in the National Firearms Registration and Transfer Record as required by Title 26, United States Code, Sections 5841, 5845(a)(7), 5861(d).

(Violation of Title 26, United States Code, Sections 5861(d), 5871.)

COUNT 16

THE GRAND JURY FURTHER CHARGES THAT:

In or about November 1981, in Fairfax County, Virginia, within the Eastern District of Virginia and elsewhere, defendants ROBERT RECKMEYER and GREG JARRETT knowingly and unalwfully did transfer approximately nine firearms, that is, nine Israeli Military Industries Uzi 9mm machine guns, one of said firearms bearing serial number SA01152, to an individual without receiving an approved application as required under Title 26, United States Code, Section 5812(a)(6).

(Violation of Title 26, United States Code, Sections 5861(e), 5871.)

COUNT 17

THE GRAND JURY FURTHER CHARGES THAT:

In or about November 1981, in Fairfax County, Virginia, within the Eastern District of Virginia and elsewhere, defendants ROBERT RECKMEYER and GREG JARRETT knowingly and unlawfully did transfer approximately five firearms, that is, five silencers, to an individual without receiving an approved application as required under Title 26, United States Code, Section 5812(a)(6).

(Violation of Title 26, United States Code, Sections 5861(e), 5871.)

COUNT 18

THE GRAND JURY FURTHER CHARGES THAT:

In or about November 1981, in Fairfax County, Virginia within the Eastern District of Virginia and elsewhere, defendant ROBERT RECKMEYER knowingly and unlawfully transferred approximately nine firearms, that is, nine Israeli Military Industries Uzi 9mm machine guns, one of said firearms bearing serial number SA01152, to a person who was not licensed as an importer, manufacturer, dealer or collector of firearms and who said RECKMEYER knew and had reasonable cause to know did not reside in the same state as ROBERT RECKMEYER.

(Violation of Title 18, United States Code, Section 922(a)(5).)

COUNT 19

THE GRAND JURY FURTHER CHARGES THAT:

In or about November 1981, in Fairfax County, Virginia within the Eastern District of Virginia and elsewhere, defendant ROBERT RECKMEYER knowingly and unlawfully transferred approximately five firearms, that is, five silencers, to a person who was not licensed as an importer, manufacturer, dealer or collector of firearms, and who the said RECKMEYER knew and had reasonable cause to know did not reside in the same state as ROBERT RECKMEYER.

(Violation of Title 18, United States Code, Section 922(a)(5).)

COUNT 20

THE GRAND JURY FURTHER CHARGES THAT:

On or about June 2-3, 1981, within the Eastern District of Virginia and elsewhere, defendant ROBERT RECKMEYER did unlawfully, knowingly and willfully transport on one occasion, monetary instruments in an amount exceeding $5,000, that is, approximately $40,000

in United States currency, from Arlington, Virginia, in the Eastern District of Virginia, United States of America, to a place outside of the United States of America, that is, Nassau, Bahamas, without filing and without causing to be filed, a Report of International Transportation of Currency (Form 4790) as required by Title 31, United States Code, Section 5316 and Title 31, Code of Federal Regulations, Sections 103.23(a) and 103.25(b), and that ROBERT RECKMEYER willfully committed this violation in furtherance of the commission of other violations of federal law, that is, Title 18, United States Code, Sections 371, 922(a)(5), 1952(a)(3), 1503 and 1622 (as alleged in Counts 13, 18, 19, 23, 47 and 48 of this Indictment); Title 21, United States Code, Sections 846, 848, 841(a)(1) (as alleged in Counts 1, 2, 8 and 9 of this Indictment); Title 26, United States Code, Sections 5861(d), 5861(e) and 5871 (as alleged in Counts 14, 15, 16 and 17 of this Indictment); and Title 26, United States Code, Section 7206 (as alleged in Counts 41, 42, and 43 of this Indictment).

(Violation of Title 31, United States Code, Section 5316; Title 31, Code of Federal Regulations, Sections 103.23(a), 103.25(b), 103.49.)

COUNT 21

THE GRAND JURY FURTHER CHARGES THAT:

On or about November 23, 1983, in Falls Church, Virginia, within the Eastern District of Virginia and elsewhere, defendant BRUCE THOMASON did unlawfully, willfully and knowingly make a false statement and report as to a material fact for the purposes of influencing the action of the First Virginia Bank, the deposits of which are insured by the Federal Deposit Insurance Corporation, on an application by BRUCE THOMASON for an automobile loan, in that BRUCE THOMASON submitted a state of Maryland Resident Income Tax Return for the calendar year 1981 (Form 502) to the First Virginia Bank which BRUCE THOMASON knew and believed to be fraudulent and false in that the said income tax

return reported substantially more income than BRUCE THOMASON actually reported to the State of Maryland for the calendar year 1981.

(Violation of Title 18, United States Code, Section 1014.)

COUNT 22

THE GRAND JURY FURTHER CHARGES THAT:

On or about May 30, 1980, within the Eastern District of Virginia and elsewhere, defendant CHRIS RECKMEYER unlawfully, knowingly and willfully did aid, abet, counsel and command another to travel in interstate commerce from the State of Virginia to West Palm Beach, Florida, with the intent to promote, manage, establish, carry on and facilitate the promotion, management, establishment and carrying on of an unlawful activity, said unlawful activity being a business enterprise involving the distribution of Schedule I non-narcotic controlled substances, that is, marijuana and hashish in violation of Title 21, United States Code, Section 841(a)(1), and therefore CHRIS RECKMEYER did cause this individual to perform and attempt to perform acts to promote, manage, carry on and facilitate the promotion, management, establishment and carrying on of the said unlawful activity.

(Violation of Title 18, United States Code, Sections 1952(a)(3) and 2.)

COUNT 23

THE GRAND JURY FURTHER CHARGES THAT:

On or about February 9, 1983, within the Eastern District of Virginia and elsewhere, defendant ROBERT RECKMEYER, unlawfully, knowingly and willfully did aid, abet, counsel and command another individual to travel in interstate commerce from the State of Virginia to Beaufort, South Carolina with the intent to promote, manage, establish, carry on and facilitate the promotion, management, establishment and carrying on of an unlawful activity, said unlawful activity being a business enterprise involving the distribution of Schedule I non-narcotic

controlled substances, that is, marijuana and hashish, in violation of Title 21, United States Code, Section 841(a)(1), and thereafter ROBERT RECKMEYER did cause this individual to perform and attempt to perform acts to promote, manage, carry on and facilitate the promotion, management, establishment and carrying on of the said unlawful activity.

(Violation of Title 18, United States Code, Sections 1952(a)(3) and 2.)

COUNT 24

THE GRAND JURY FURTHER CHARGES THAT:

On or about February 2, 1979, in the Eastern District of Virginia and elsewhere, defendant CHRIS RECKMEYER did willfully and knowingly make and subscribe, and cause to be made and subscribed, a United States Individual Income Tax Return, Form 1040, for the calendar year 1978, which was verified by a written declaration that it was made under the penalties of perjury and was filed with the Internal Revenue Service, which said income tax return CHRIS RECKMEYER did not believe to be true and correct as to every material matter in that the return failed to disclose, on an attached Schedule C, or otherwise, that CHRIS RECKMEYER had received substantial gross receipts and incurred substantial expenses from a business activity conducted in the Eastern District of Virginia and elsewhere, to wit: the distribution of marijuana.

(Violation of Title 26, United States Code, Section 7206(1); Title 18, United States Code, Section 2.)

COUNT 25

THE GRAND JURY FURTHER CHARGES THAT:

On or about April 15, 1980, in the Eastern District of Virginia and elsewhere, defendent CHRIS RECKMEYER did willfully and knowingly make and subscribe a United States Individual Income Tax Return, Form 1040, for the calendar year 1979, which was verified by a written declaration that it was made under the penalties of perjury

and was filed with the Internal Revenue Service, which said income tax return CHRIS RECKMEYER did not believe to be true and correct as to every material matter in that the return failed to disclose, on an attached Schedule C, or otherwise, that CHRIS RECKMEYER had received substantial gross receipts and incurred substantial expenses from a business activity, to wit: the distribution of marijuana.

(Violation of Title 26, United States Code, Section 7206(1); Title 18, United States Code, Section 2.)

COUNT 26

THE GRAND JURY FURTHER CHARGES THAT:

On or about September 23, 1981, in the Eastern District of Virginia and elsewhere, defendant CHRIS RECKMEYER did willfully and knowingly aid and assist in, and counsel, procure and advise the preparation and presentation to the Internal Revenue Service, of the 1980 U.S. Individual Income Tax Return, Form 1040, of CHRIS RECKMEYER and Nancy Reckmeyer which said tax return CHRIS RECKMEYER knew and believed to be fraudulent and false as to a material matter, in that the return failed to disclose, on an attached Schedule C, or otherwise, that CHRIS RECKMEYER had received substantial gross receipts and incurred substantial expenses from a business activity, to wit: the distribution of marijuana and hashish.

(Violation of Title 26, United States Code, Section 7206(2); Title 18, United States Code, Section 2.)

COUNT 27

THE GRAND JURY FURTHER CHARGES THAT:

On or about August 19, 1982, in the Eastern District of Virginia and elsewhere, defendant CHRIS RECKMEYER did willfully and knowingly make and subscribe a United States Individual Income Tax Return, Form 1040, for the calendar year 1981, which was verified by a written declaration that it was made under the penalties of perjury and was filed with the Internal Revenue Service, which

said income tax return CHRIS RECKMEYER did not believe to be true and correct as to every material matter in that the return failed to disclose, on an attached Schedule C, or otherwise, that CHRIS RECKMEYER had received substantial gross receipts and incurred substantial expenses from a business activity, to wit: the distribution of marijuana and hashish.

(Violation of Title 26, United States Code, Section 7206(1); Title 18, United States Code, Section 2.)

COUNT 28

THE GRAND JURY FURTHER CHARGES THAT:

On or about August 15, 1983, in the Eastern District of Virginia, and elsewhere, defendant CHRIS RECKMEYER did willfully and knowingly make and subscribe a United States Individual Income Tax Return, Form 1040, for the calendar year 1982, which was verified by a written declaration that it was made under the penalties of perjury and was filed with the Internal Revenue Service, which said income tax return CHRIS RECKMEYER did not believe to be true and correct as to every material matter in that the return failed to disclose, on an attached Schedule C, or otherwise, that CHRIS RECKMEYER had received substantial gross receipts and incurred substantial expenses from a business activity, to wit: the distribution of marijuana and hashish.

(Violation of Title 26, United States Code, Section 7206(1); Title 18, United States Code, Section 2.)

COUNT 29

THE GRAND JURY FURTHER CHARGES THAT:

On or about June 14, 1980, in the Eastern District of Virginia, and elsewhere, defendant CHRIS RECKMEYER, who was the President of Crancy's Inc., a corporation, did wilfully and knowingly aid and assist in, and counsel, procure and advise the preparation and presentation to the Internal Revenue Service of the United States Corporation Income Tax Return, Form 1120, of Crancy's Inc., for the fiscal year ended January 31, 1980, which

CHRIS RECKMEYER knew and believed to be fraudulent and false as to a material matter in that the return reported substantially more gross receipts than the corporation had actually earned.

(Violation of Title 26, United States Code, Section 7206(2).)

COUNT 30

THE GRAND JURY FURTHER CHARGES THAT:

On or about July 15, 1981, in the Eastern District of Virginia and elsewhere, defendant CHRIS RECKMEYER, who was the President of Crancy's Inc., a corporation, did willfully and knowingly make and subscribe a United States Corporation Income Tax Return, Form 1120, of Crancy's Inc., for the fiscal year ended January 31, 1981, which was verified by a written declaration that it was made under the penalties of perjury and was filed with the Internal Revenue Service, which said income tax return CHRIS RECKMEYER did not believe to be true and correct as to every material matter in that the return reported substantially more gross receipts than the corporation had actually earned.

(Violation of Title 26, United States Code, Section 7206(1).)

COUNT 31

THE GRAND JURY FURTHER CHARGES THAT:

On or about October 17, 1983, in the Eastern District of Virginia and elsewhere, defendant CHRIS RECKMEYER, who was the President of Crancy's Inc., a corporation, did willfully and knowingly make and subscribe a United States Corporation Income Tax Return, Form 1120, of Crancy's Inc., for the fiscal year ended January 31, 1983, which was verified by a written declaration that it was made under the penalties of perjury and was filed with the Internal Revenue Service, which said income tax return CHRIS RECKMEYER did not believe to be true and correct as to every material matter in that the

return reported substantially more gross receipts than the corporation had actually earned.

(Violation of Title 26, United States Code, Section 7206(1).)

COUNT 32

THE GRAND JURY FURTHER CHARGES THAT:

On or about May 11, 1980, in the Eastern District of Virginia and elsewhere, defendant STEVE WORTH did willfully and knowingly make and subscribe a United States Individual Income Tax Return, Form 1040, for the calendar year 1978, which was verified by a written declaration that it was made under the penalties of perjury and was filed with the Internal Revenue Service, which said income tax return STEVE WORTH did not believe to be true and correct as to every material matter in that the return failed to disclose, on an attached Schedule C, or otherwise, that STEVE WORTH had received substantial gross receipts and incurred substantial expenses from a business activity, to wit: the distribution of marijuana.

(Violation of Title 26, United States Code, Section 7206(1); Title 18, United States Code, Section 2.)

COUNT 33

THE GRAND JURY FURTHER CHARGES THAT:

On or about May 11, 1980, in the Eastern District of Virginia and elsewhere, defendant STEVE WORTH did willfully and knowingly make and subscribe a United States Individual Income Tax Return, Form 1040, for the calendar year 1979, which was verified by a written declaration that it was made under the penalties of perjury and was filed with the Internal Revenue Service, which said income tax return STEVE WORTH did not believe to be true and correct as to every material matter in that the return failed to disclose, on an attached Schedule C, or otherwise, that STEVE WORTH had received substantial gross receipts and incurred substantial expenses from a business activity, to wit: the distribution of marijuana.

(Violation of Title 26, United States Code, Section 7206(1); Title 18, United States Code, Section 2.)

COUNT 34

THE GRAND JURY FURTHER CHARGES THAT:

On or about April 16, 1979, in the Eastern District of Virginia and elsewhere, defendant PATRICIA RECKMEYER did willfully and knowingly make and subscribe, and cause to be made and subscribed, a United States Individual Income Tax Return, Form 1040, for the calendar year 1978, which was verified by a written declaration that it was made under the penalties of perjury and was filed with the Internal Revenue Service, which said income tax return PATRICIA RECKMEYER did not believe to be true and correct as to every material matter in that the return failed to disclose, on an attached Schedule C, or otherwise, that PATRICIA RECKMEYER and her husband ROBERT RECKMEYER had received substantial gross receipts and incurred substantial expenses from a business activity conducted in the Eastern District of Virginia and elswehere, to wit: the distribution of marijuana.

(Violation of Title 26, United States Code, Section 7206(1); Title 18, United States Code, Section 2.)

COUNT 35

THE GRAND JURY FURTHER CHARGES THAT:

On or about August 16, 1980, in the Eastern District of Virginia and elsewhere, defendant PATRICIA RECKMEYER did willfully and knowingly make and subscribe a United States Individual Income Tax Return, Form 1040, for the calendar year 1979, which was verified by a written declaration that it was made under the penalties of perjury and was filed with the Internal Revenue Service, which said income tax return PATRICIA RECKMEYER did not believe to be true and correct as to every material matter in that the return failed to disclose, on an attached Schedule C, or otherwise, that PATRICIA RECKMEYER and her husband ROBERT RECKMEYER

had received substantial gross receipts and incurred substantial expenses from a business activity, to wit: the distribution of marijuana.

(Violation of Title 26, United States Code, Section 7206(1); Title 18, United States Code, Section 2.)

COUNT 36

THE GRAND JURY FURTHER CHARGES THAT:

On or about October 15, 1981, in the Eastern District of Virginia and elsewhere, defendant PATRICIA RECKMEYER did willfully and knowingly make and subscribe a United States Individual Income Tax Return, Form 1040, for the calendar year 1980, which was verified by a written declaration that it was made under the penalties of perjury and was filed with the Internal Revenue Service, which said income tax return PATRICIA RECKMEYER did not believe to be true and correct as to every material matter in that the return failed to disclose, on an attached Schedule C, or otherwise, that PATRICIA RECKMEYER and her husband ROBERT RECKMEYER had received substantial gross receipts and incurred substantial expenses from a business activity, to wit: the distribution of marijuana and hashish.

(Violation of Title 26, United States Code, Section 7206(1); Title 18, United States Code, Section 2.)

COUNT 37

THE GRAND JURY FURTHER CHARGES THAT:

On or about June 15, 1982, in the Eastern District of Virginia and elsewhere, defendant PATRICIA RECKMEYER did willfully and knowingly make and subscribe a United States Individual Income Tax Return, Form 1040, for the calendar year 1981, which was verified by a written declaration that it was made under the penalties of perjury and was filed with the Internal Revenue Service, which said income tax return PATRICIA RECKMEYER did not believe to be true and correct as to every material matter in that the return failed to disclose, on an attached Schedule, C, or otherwise, that PATRICIA

RECKMEYER and her husband ROBERT RECKMEYER had received substantial gross receipts and incurred substantial expenses from a business activity, to wit: the distribution of marijuana and hashish.

(Violation of Title 26, United States Code, Section 7206(1); Title 18, United States Code, Section 2.)

COUNT 38

THE GRAND JURY FURTHER CHARGES THAT:

On or about August 10, 1983, in the Eastern District of Virginia and elsewhere, defendant PATRICIA RECKMEYER did willfully and knowingly make and subscribe a United States Individual Income Tax Return, Form 1040, for the calendar year 1982, which was verified by a written declaration that it was made under the penalties of perjury and was filed with the Internal Revenue Service, which said income tax return PATRICIA RECKMEYER did not believe to be true and correct as to every material matter in that the return failed to disclose, on an attached Schedule C, or otherwise, that PATRICIA RECKMEYER and her husband ROBERT RECKMEYER had received substantial gross receipts and incurred substantial expenses from a business activity, to wit: the distribution of marijuana and hashish.

(Violation of Title 26, United States Code, Section 7206(1); Title 18, United States Code, Section 2.)

COUNT 39

THE GRAND JURY FURTHER CHARGES THAT:

On or about August 17, 1979, in the Eastern District of Virginia and elsewhere, defendant ROBERT RECKMEYER, who was the President of United Trade Inc., a corporation, did willfully and knowingly make and subscribe a United States Corporation Income Tax Return, Form 1120, of United Trade Inc., for the fiscal year ended April 30, 1979, which was verified by a written declaration that it was made under the penalties of perjury and was filed wdith the Internal Revenue Service, which said income tax return ROBERT RECKMEYER did not be-

lieve to be true and correct as to every material matter in that the return reported substantially more gross receipts than the corporation had actually earned.

(Violation of Title 26, United States Code, Section 7206(1).)

COUNT 40

THE GRAND JURY FURTHER CHARGES THAT:

On or about October 15, 1980, in the Eastern District of Virginia and elsewhere, defendant ROBERT RECKMEYER, who was the President of United Trade, Inc., a corporation, did willfully and knowingly make and subscribe a United States Corporation Income Tax Return, Form 1120, of United Trade Inc., for the fiscal year ended April 30, 1980, which was verified by a written declaration that it was made under the penalties of perjury and was filed with the Internal Revenue Service, which said income tax return ROBERT RECKMEYER did not believe to be true and correct as to every material matter in that the return reported substantially more gross receipts than the corporation had actually earned.

(Violation of Title 26, United States Code, Section 7206(1).)

COUNT 41

THE GRAND JURY FURTHER CHARGES THAT:

On or about January 15, 1982, in the Eastern District of Virginia, and elsewhere, defendant ROBERT RECKMEYER who was President of United Trade, Inc., a corporation, did willfully and knowingly make and subscribe a United States Corporation Income Tax Return, Form 1120, of United Trade Inc., for the fiscal year ended April 30, 1981, which was verified by a written declaration that it was made under the penalties of perjury and was filed with the Internal Revenue Service, which said income tax return ROBERT RECKMEYER did not believe to be true and correct as to every material matter in that the return reported substantially more gross receipts than the corporation had actually earned.

(Violation of Title 26, United States Code, Section 7206(1).)

COUNT 42

THE GRAND JURY FURTHER CHARGES THAT:

On or about March 3, 1983, in the Eastern District of Virginia, and elsewhere, defendant ROBERT RECKMEYER, who was President of United Trade, Inc., a corporation, did willfully and knowingly aid and assist in and cause, procure and advise the preparation and presentation to the Internal Revenue Service of a United States Corporation Income Tax Return, Form 1120, of United Trade Inc., for the fiscal year ended April 30, 1981, which ROBERT RECKMEYER knew and believed to be fraudulent and false as to a material matter in that the return reported substantially more gross receipts than the corporation had actually earned.

(Violation of Title 26, United States Code, Section 7206(2).)

COUNT 43

THE GRAND JURY FURTHER CHARGES THAT:

On or about January 20, 1984, in the Eastern District of Virginia and elsewhere, defendant ROBERT RECKMEYER, who was the President of United Trade, Inc., a corporation, did willfully and knowingly make and subscribe a United States Corporation Income Tax Return, Form 1120, of United Trade Inc., for the fiscal year ended April 30, 1983, which was verified by a written declaration that it was made under the penalties of perjury and was filed with the Internal Revenue Service, which said income tax return ROBERT RECKMEYER did not believe to be true and correct as to every material matter in that the return reported substantially more gross receipts than the corporation had actually earned.

(Violation of Title 26, United States Code, Section 7206(1).)

COUNT 44

THE GRAND JURY FURTHER CHARGES THAT:

On or about April 17, 1981, in the Eastern District of Virginia and elsewhere, defendant BRUCE THOMASON did willfully and knowingly make and subscribe a United States Individual Income Tax Return, Form 1040, for the calendar year 1979, which was verified by a written declaration that it was made under the penalties of perjury and was filed with the Internal Revenue Service which said income tax return BRUCE THOMASON did not believe to be true and correct as to every material matter in that the return failed to disclose, on an attached Schedule C, or otherwise, that BRUCE THOMASON had received substanial gross receipts and incurred substantial expenses from a business activity, to wit: the distribution of marijuana.

(Violation of Title 26, United States Code, Section 7206(1); Title 18, United States Code, Section 2.)

COUNT 45

THE GRAND JURY FURTHER CHARGES THAT:

On or about April 25, 1982, in the Eastern District of Virginia and elsewhere, defendant BRUCE THOMASON did willfully and knowingly make and subscribe a United States Individual Income Tax Return, Form 1040, for the calendar year 1980, which was verified by a written declaration that it was made under the panalties of perjury and was filed with the Internal Revenue Service, which said income tax return BRUCE THOMASON did not believe to be true and correct as to every material matter in that the return failed to disclose, on an attached Schedule C, or otherwise, that BRUCE THOMASON had received substanial gross receipts and incurred substantial expenses from a business activity, to wit: the distribution of marijuana and hashish.

(Violation of Title 26, United States Code, Section 7206(1); Title 18, United States Code, Section 2.)

COUNT 46

THE GRAND JURY FURTHER CHARGES THAT:

On or about April 15, 1982, in the Eastern District of Virginia and elsewhere, defendent BRUCE THOMASON did willfully and knowingly make and subscribe a United States Individual Income Tax Return, Form 1040, for the calendar year 1981, which was verified by a written declaration that it was made under the penalties of perjury and was filed with the Internal Revenue Service, which said income tax return BRUCE THOMASON did not believe to be true and correct as to every material matter in that the return failed to disclose, on an attached Schedule C, or otherwise, that BRUCE THOMASON had received substantial gross receipts and incurred substantial expenses from a business activity, to wit: the distribution of marijuana and hashish.

(Violation of Title 26, United States Code, Section 7206(1); Title 18, United States Code, Section 2.)

COUNT 47

THE GRAND JURY FURTHER CHARGES THAT:

During a period from on or about June 8, 1984 through June 28, 1984, in Alexandria, Virginia, in the Eastern District of Virginia and elsewhere, defendent ROBERT RECKMEYER unlawfully, willfully and knowingly did corruptly influence, obstruct and impede the due administration of justice and endeavor to corruptly influence, obstruct and impede the due administration of justice in the United States District Court for the Eastern District of Virginia, in that the said ROBERT RECKMEYER knowing that Larry D. Sanders had received a subpoena to appear before the Grand Jury inquiring in said District into possible violations of the drug laws (Title 21, United States Code, Section 841, *et seq.*) and the Internal Revenue laws (Title 26, United States Code, Sections 7201 and 7206), urged, advised and persuaded Larry D. Sanders not to testify before said Grand Jury in relation to the aforementioned violation.

(Violation of Title 18, United States Code, Section 1503.)

COUNT 48

THE GRAND JURY FURTHER CHARGES THAT:

On or about June 27-28, 1984, at Alexandria, Virginia, in the Eastern District of Virginia, defendant ROBERT RECKMEYER did unlawfully, willfully and knowingly suborn, instigate, induce and procure Larry D. Sanders, to make a false material declaration while said Larry D. Sanders was under oath as a witness in a criminal investigation conducted by and before Grand Jury 83-2 of the United States District Court for the Eastern District of Virginia, in the matter entitled *United States v. John Doe 462,* that is:

1. At the time and place aforesaid, Grand Jury 83-2 was inquiring into the unlawful possession and distribution of controlled substances and Internal Revenue violations.

2. It was a material matter to the Grand Jury investigation to identify instances in which ROBERT RECKMEYER was involved in the unlawful possession and distribution of controlled substances.

3. At the time and place aforesaid, Larry D. Sanders, while under oath and in consequence of the willful subordination, inducement and procurement by ROBERT RECKMEYER, did declare before Grand Jury 83-2 with respect to the aforesaid material matter as follows:

Q Have you ever assisted ROBERT RECKMEYER in transporting marijuana or hashish, other than what you actually purchased from him?

A Occasionally.

Q Tell us about that.

A He told me he needed pot picked up, or delivered, or actually picked up. Well, it would still be picking up and delivery——

Q I am sorry. I don't understand.

A If I picked it up, I would have to deliver it someplace, or——

Q Did you ever move pot from one location to another for Robert Reckmeyer?

A Yes.

Q How many times did you do that?

A I could not tell you. A few times a year.

Q Every year you were dealing with him?

A No. At the very end.

Q Starting with what year?

A I cannot remember right now. It might have been 1979. For sure it was '80; and '80 and '81.

Q So that would have been a few times each year during that time period from maybe 1979 through '80 through '81, into the first of '82?

A I did not do anything in '82.

Q Nothing in '82?

A No.

Q So throughout '80 and '81, maybe '79, we are talking about at least six times? Is that right?

A Yes. I think so.

Q Is it possible it was more than six times?

A It might have been a few times more or less.

4. The aforesaid testimony of Larry D. Sanders, as he and defendant ROBERT RECKMEYER then and there well knew and believed, was false, in that, on numerous occasions during and since 1982, ROBERT RECKMEYER caused Larry D. Sanders to unlawfully possess, transport and/or distribute marijuana and hashish.

(All in violation of Title 18, United States Code, Section 1622.)

A true bill: Barbara C. Proctor, *Foreperson;* Elsie L. Munsell, *United States Attorney;* Karen P. Tandy, *Assistant United States Attorney;* June Seraydar, *Special Assistant United States Attorney.*

In The United States District Court for the Eastern District of Virginia, Alexandria Division

UNITED STATES OF AMERICA

vs.

JOHN DOE #462, *Defendant*

GRAND JURY NO. 83-2

Friday, December 28, 1984

Alexandria, Virginia

Transcript of the Court's ruling in the above-captioned matter.

BEFORE: The Honorable ALBERT V. BRYAN, JR., Judge, United States District Court

APPEARANCES:

FOR THE UNITED STATES: JOSEPH P. ARONICA, ESQUIRE, KAREN P. TANDY, ESQUIRE, Assistant United States Attorneys, 701 Prince Street, Alexandria, Virginia 22314.

FOR THE DEFENDANT: JOHN M. DOWD, ESQUIRE, NEIL J. WELCH, JR., ESQUIRE, LISA J. STARK, ESQUIRE, OF: Heron, Burchette, Ruckert & Rothwell, 1025 Thomas Jefferson Street, N.W., Suite 700, Washington, D.C. 20007.

[109] PROCEEDINGS

THE COURT: First of all, I think it is important to identify what documents we are talking about and which ones were viewed by Ms. Tandy. I take it from her testimony that she did not view the five documents—or maybe it was four. She did not view Documents 101-41, 101-56, 112-19, and 101-45 and 112-14. Those are the

four documents which were the subject of the Court of Appeal's reversal as to three of them, I think, and reversal with the direction to redact part of them as to two.

However, Agent Holleran did view them. Ms. Tandy also viewed those documents determined to be privileged in this Court's order of June 8, specifically June 8, 1984, and specifically those documents listed at the top of page 6. Agent Holleran also viewed those. Agent Meckley viewed everything Ms. Tandy viewed.

Ms. Tandy also fanned, as she put it, the inventory attached to the letter of Mr. Lips and which was the subject of a prior hearing in another case and which, I am told, although this Court and the Court of Appeals upheld the privilege, that it is still subject to review.

In any event, at this stage, it is something she should not have looked at, and she certainly did.

Insofar as the manner in which she acquired possession of the documents, I do not find that she set out [110] deliberately to circumvent the Court's order by viewing documents that she knew she was not supposed to. I do think, however, that in perhaps overzealousness she moved a little fast and took risks that she ought not to have taken, and I think to rely upon the Clerk's office or an employee of mine to look at documents that had previously been sealed by the Court without a Court order is carelessness, although, as I said, not a deliberate attempt to circumvent the Court's order.

Her disclaimer of any concern with the numbers is, it seems to me, of small comfort to the government. Numbers were the way the documents were referred to in the order of this Court, in the ruling of the Fourth Circuit, and they were clearly stamped on the folders containing the documents listed on page 6 of my June 8 opinion. With an easy comparison it could have been determined that they were among those ruled privileged.

But the damage was done, and I see no way to cure it other than disqualification of Ms. Tandy, Agent Holleran, and Agent Meckley from further participation in the in-

vestigation of the Reckmeyers that these documents were sought to support.

It is a drastic remedy, and I accept the government's concern that this investigation has progressed to an extent that it will be a hardship on the government [111] for a new Assistant United States Attorney and new agents to familiarize themselves with the case using only non-privileged documents to an extent where they can continue the grand jury investigation that has been begun.

I do not extend the disqualification to Striker or Preston or Cusick, really, because I don't think that what he gleaned is from the privileged documents. But I do think that Ms. Tandy and Holleran and Meckley should be disqualified from participating directly or indirectly in any further investigation that was being conducted and which the subpoenas which sought these documents sought to further.

They will be prohibited from discussing the case with any person who does appear before a grand jury in that investigation or any subsequent grand jury that might continue the investigation.

They will be directed to forward to the Court under seal any notes or questions that Mr. Meckley prepared that Ms. Tandy has in her file. They will be directed to inquire of Mr. Holleran as to whether he made any notes that he kept or that he has in his possession or if he knows of their whereabouts or anybody that he talked to about it, knowledge of which comes to the attention of Mr. Aronica after inquiry.

I will prepare the order.

Court will stand adjourned.

(Whereupon at 5:27 p.m., Court was adjourned.)

In The United States District Court for the Eastern District of Virginia, Alexandria Division

In re: JOHN DOE NO. 462 (Robert J. and Patricia L. Reckmeyer)

GRAND JURY NO. 83-2

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Upon consideration of the evidence adduced before the court on December 28, 1984, in addition to the parties' written stipulation of facts (attached as Appendix A), the court makes the following findings of fact and conclusions of law:

1. On November 23, 1984, following the decision of the United States Court of Appeals for the Fourth Circuit (Nos. 84-1508, 1627, 1628, November 16, 1984), United States Customs Special Agent Tim Holleran (Holleran), at the direction of Assistant United States Attorney Karen P. Tandy (Tandy), picked up from the clerk's office the box of documents that were the subject of that appeal. That box was apparently still then in the same condition as when received by the clerk's office from the Court of Appeals.

2. That is authorizing agent Holleran to pick up the box of documents, Tandy was acting on information received from the clerk's office and the court's staff which apparently led her to believe that the court had reviewed the documents, redacted those which the Court of Appeals directed to be redacted, and removed those found to be privileged. In fact the court had not opened the box or taken any action with regard to the documents.

3. The box of documents, by this time unsealed, were delivered by Holleran to Tandy's office, where she reviewed some of them briefly. Included among these documents were Nos. 10190-91, 11202-11205, 11215, 11218,

11348-11251, 11359-11362, 11363-11374, 11376-11379, 11380, 11381-11383, 11384-11385, 11386-11391, 11392-11393, 11394-11406, 11407-11410, 11440-11441, 11442-11445, 11446, 11447-11450, and 11453-11456, which the court had found to be privileged in its June 8, 1984 Memorandum Opinion and Order. In her examination of the documents, then and later the same day, Tandy made no comparison of the separate numbered file folders, one for each document, with the document numbers referred to in the decision of the Court of Appeals and the June 8, 1984 decision of this court, although those numbers were on the outside of each file folder as well as on each document. Loose in the box was document No. 11453, a letter of June 16, 1982, from the law firm of Odin, Feldman and Pittleman, which had been found to be privileged. Tandy examined that document.

4. All the documents were then turned over to agent Holleran for examination. After he had taken the documents to his office, he telephoned Tandy, told her he was examining the documents, and asked whether he should examine the documents marked privileged. Tandy told him he should. He reviewed all the documents in the box, including the privileged and to-be-redacted documents.

5. Later that same day, November 23, 1984, Holleran returned the documents to Tandy. She went over all the documents; however, nothing that documents 10141, 10156, 10145, 11219 and 11214 were bound together with a rubber band with a slip of paper on the outside indicating they were documents found by the Fourth Circuit to be privileged and required to be redacted, she put those aside and did not examine them.

6. On November 26, 1984, in preparation for a grand jury session on November 27, 1984, at which the witness Egbert Jonker was expected to testify, Tandy turned over to Internal Revenue Special Agent James Meckley (Meckley) all of the documents she had examined, including the documents found to be privileged in this court's ruling of June 8, 1984, but apparently not including documents

10141, 10156, 10145, 11219 and 11214. Meckley examined all the documents Tandy turned over to him.

6. None of the privileged documents now at issue or their contents has been shown or revealed to Grand Jury 83-2; however, document 11453, the June 16, 1982 letter, was shown to Grand Jury 84-3.

7. Neither Tandy, Holleran nor Meckley has discussed the contents of the privileged documents with anyone else or disclosed the documents to anyone else, except the one disclosure, above-mentioned, to Grand Jury 84-3.

8. Tandy has in her file notes or questions, prepared by Meckley from his examination of the documents for her use before Grand Jury 84-3.

From the foregoing the court concludes that the remedy suggested by the United States, namely, no further use by the government of the privileged documents and their return to counsel for the Reckmeyers, will not adequately maintain the integrity of the confidential attorney-client privilege, and cannot insure that those who have viewed the documents will not, even subconsciously, be affected by knowledge gained thereby in pursuing the investigation of the Reckmeyers. The court further concludes that the only adequate appropriate remedy is disqualification of the Assistant United States Attorney and two agents from further participation in the investigation.

Accordingly, it is hereby ORDERED that:

1. Assistant United States Attorney Karen P. Tandy, United States Customs Special Agent Tim Holleran, and Internal Revenue Service Special Agent James Meckley are disqualified and prohibited from directly or indirectly participating in the investigation now being conducted by Grand Jury 83-2, or any subsequent grand jury investigation of Robert J. Reckmeyer and Patricia L. Reckmeyer, in furtherance of which the subpoenas, which were quashed in part be this court's order of June 8, 1984 and by the decision of the United States Court of Appeals for the Fourth Circuit (Nos. 84-1508, 1682, November 26,

1984), were issued. They are further enjoined from directly or indirectly revealing the contents of the privileged documents to any other person.

2. Assistant United States Attorney Karen P. Tandy shall forthwith file with the court under seal the notes or questions prepared by Special Agent Meckley and which she testified are still in her file.

3. Inquiry shall be made of Special Agent Holleran to determine whether he has any notes made as a result of his viewing of the documents which the said decisions of this court and the Court of Appeals has ruled are privileged. If any such notes exist they should be filed with the court under seal forthwith.

ALBERT V. BRYAN, Jr., *United States District Judge.*

Alexandria, Virginia
December 28th, 1984

In The United States District Court for the Eastern District of Virginia, Alexandria Division

In Re: John DOE No. 462

GRAND JURY NO. 84-3

STIPULATION

Robert B. Reckmeyer and the United States hereby agree to the following facts in connection with the hearing set for December 28, 1984:

1. Karen P. Tandy is an Assistant United States Attorney for the Eastern District of Virginia and has been in charge of the investigation known as John Doe 462 since March of 1983.

2. On August 26, 1983, Assistant United States Attorney Tandy caused a federal grand jury subpoena *duces tecum* to be issued to the law firm of Odin, Feldman & Pittleman requesting the production of documents pertaining to Robert B. Reckmeyer.

3. On September 26, 1983, Odin, Feldman & Pittleman produced non-privileged documents responsive to the August 30, 1983 subpoena.

APPENDIX A

4. On March 1, 1984, Assistant United States Attorney Tandy caused to be issued a grand jury subpoena *duces tecum* to James Pittleman of the law firm of Odin, Feldman & Pittleman requesting production of all records relating to transactions between the law firm and Robert B. Reckmeyer and Christopher Reckmeyer.

5. On March 7, 1984, James Pittleman produced nonprivileged documents to the United States concerning Christopher Reckmeyer.

6. On March 21, 1984, Assistant United States Attorney Tandy caused to be issued two grand jury subpoenas *duces tecum* to Robert B. Reckmeyer, which sought business records. On March 22, 1984, a third subpoena served

on Mr. Reckmeyer in his individual capacity called for the production of his personal records.

7. On April 10, 1984, Robert B. Reckmeyer filed a Motion to Quash on Fifth Amendment grounds that portion of the subpoena *duces tecum* served on him in his individual capacity which called for the production of his personal records.

8. On April 13, 1984, this Court granted Robert B. Reckmeyer's Motion to Quash the subpoena *duces tecum* to the extent that it called for the production of his personal records. This Court directed counsel for Mr. Reckmeyer to submit an *in camera* list of those documents asserted to be personal records.

9. On April 18, 1984, Mr. Reckmeyer submitted the inventory list of personal documents with a cover letter indicating that the list was being filed as an *in camera* submission.

10. On April 19, 1984, this Court issued a memorandum opinion finding Reckmeyer's documents "clearly to be personal" and protected by the Fifth Amendment. This Court also ordered that the *in camera* list be sealed.

11. On March 9, 1984, Assistant United States Attorney Tandy caused to be issued a grand jury subpoena *duces tecum* to Egbert Jonker requesting the production of all records concerning all corporations of Robert Reckmeyer and Chris Reckmeyer. An identical subpoena *duces tecum* was issued to the Custodian of Records of Mr. Jonker's law firm, Loyens & Volkmaars.

12. On April 12, 1984, a second subpoena *duces tecum* was issued to Egbert Jonker requesting the production of all records concerning Robert B. Reckmeyer and Chris Reckmeyer and his businesses.

13. On April 16, 1984, Egbert Jonker moved to quash the three subpoenas issued to him and his law firm on the grounds of Robert B. Reckmeyer's attorney-client privilege.

14. On April 24, 1984, Robert B. Reckmeyer moved to intervene and to quash the three subpoenas to Egbert Jonker and his law firm.

15. On April 27, 1984, at the hearing on Robert B. Reckmeyer's Motion to Quash the Jonker subpoenas, counsel for Robert Reckmeyer submitted the four Jonker documents claimed as privileged to the Court *in camera.*

16. On May 3, 1984, the Court issued a Memorandum Opinion and Order denying Reckmeyer's Motion to Quash and ordering the production of the four Jonker documents.

17. On May 9, 1984, Robert B. Reckmeyer filed a Notice of Appeal from the Court's May 3, 1984, Order denying the Motion to Quash as to the four Jonker documents.

18. On May 10, 1984, this Court stayed its Order of May 3, 1984, concerning the Jonker documents pending appeal to the Fourth Circuit Court of Appeals.

19. On May 18, 1984, the United States filed a Notice of Appeal from the April 19, 1984, Order granting the Motion to Quash as to Robert Reckmeyer's personal documents.

20. On May 23, 1984, the law firm of Odin, Feldman & Pittleman filed a motion for *in camera* inspection of the documents responsive to the subpoenas issued to the law firm.

21. On May 30, 1984, Robert B. Reckmeyer filed a Motion to Intervene and to Quash the subpoenas issued to Odin, Feldman & Pittleman.

22. On June 1, 1984, at the hearing on the Motions to Quash the Odin, Feldman & Pittleman subpoenas, the Court directed Robert Reckmeyer to submit *in camera* the documents claimed as privileged along with an inventory list of the documents and the reasons why he was asserting the privilege.

23. On June 4, 1984, Robert B. Reckmeyer submitted *in camera* to this Court 45 numbered documents to which he claimed the attorney-client privileged along with copies of those documents. Each page of each document was la-

beled with a specific number and was in a separate manila folder which was labeled on the outside.

24. On June 8, 1984, this Court issued a memorandum opinion and Order granting Reckmeyer's Motion to Quash with regard to 14 documents submitted *in camera* ruling that these documents were protected by the attorney-client privilege. On page 6 of this Court's Memorandum Opinion, the Court found privileged the documents numbered 10190-91, 11202-11205, 11215, 11218, 11348-11351, 11359-11362, 11363-11374, 11376-11379, 11380, 11381-11383, 11394-11385, 11386-11391, 11392-11393, 11394-11406, 11407-11410, 11440-11441, 11442-11445, 11446, 11447-11450, and 11453-11456. The Court ordered all papers and submissions sealed. Assistant United States Attorney Tandy read the opinion.

25. On June 8, 1984, the Court also found some documents not privileged.

26. On June 13, 1984, Robert B. Reckmeyer filed a Notice of Appeal from the June 8, 1984, Order denying in part his Motion to Quash. The Court also issued on Order staying its Order of June 8, 1984 pending appeal.

27. On June 27, 1984, the United States Court of Appeals for the Fourth Circuit consolidated the Jonker (84-1548L) and the Odin, Feldman & Pittleman (84-1627) and 84-1628) appeals.

28. On September 24, 1984, the United States Court of Appeals for the Fourth Circuit affirmed the District Court's decision with regard to Robert B. Reckmeyer's claim of Fifth Amendment privilege on the personal documents. The mandate Order was issued on September 24, 1984 (84-1527).

29. On November 16, 1984, the United States Court of Appeals for the Fourth Circuit affirmed the District Court's decision in part finding the four Jonker documents not privileged. As to Odin, Feldman & Pittleman documents, the Court of Appeals affirmed the District Court's Order denying the Motion to Quash except as to five other documents. The Fourth Circuit ruled that docu-

ments numbered 110156, 11214, and 11219 were privileged and portions of documents numbered 10141 and 10145 were protected by the attorney-client privilege. Subsequent to the decision, the Fourth Circuit sent all the documents involved in the case back in the United States District Court for the Eastern District of Virginia, Alexandria Division.

30. On Monday, November 19, 1984, Assistant United States Attorney, Karen Tandy received and read a copy of the Fourth Circuit Opinion of November 16, 1984, and was aware that certain documents were held to be privileged.

* * * * *

45. On November 27, 1984, Egbert Jonker appeared and testified before Grand Jury 84-3.

* * * * *

47. On November 27, 1984, Mr. Jonker appeared before the grand jury. Assistant United States Attorney Tandy introduced to the grand jury Document number 11447-11450, the letter of June 16, 1982, from James Pittleman to Robert Reckmeyer which this Court held to be privileged on June 8, 1984.

* * * * *

49. On November 28, 1984, the following documents with manila folders were returned to the Court: 11218, 11215, 11363-11374, 11440-11441, 11380, 11381-11383, 11386-11391, 11384-11385, 11392-11393, 11394-11406, 11407-11410, 10190-10191. Document number 11446, a letter dated 8/20/82 from James Pittleman to Egbert Jonker which was without a manila folder was returned to the Court on November 28, 1984. In addition, a duplicate copy of document number 11440-11441, a privileged memorandum from Egbert Jonker to Pim Bertels dated August 23, 1982 which had portions underscored in

yellow was also returned to the Court on November 28, 1984.

* * * * *

55. On November 29, 1984, counsel for Mr. Reckmeyer wrote and had hand delivered a letter to Assistant United States Attorney Aronica indicating that the seven aforemention documents were missing from the Court files and requesting a search for those documents in the government files.

56. On November 30, 1984, Assistant United States Attorney Justin Williams sent a letter to the Court with a copy to counsel indicating that the seven aforementioned documents had been found in government's files and were being returned to the Court. * * *

57. On December 3, 1984, the seven aforementioned privileged documents were returned to the Court.

58. On December 10, 1984, counsel for Robert Reckmeyer filed a Motion for An *In Camera* Evidentiary Hearing and Other Appropriate Relief and a Memorandum of Points and Authorities in Support thereof.

59. On December 11, 1984, the Court wrote a letter to John M. Dowd, Neil J. Welch, Jr. and Elsie L. Munsell, setting an evidentiary hearing on possible unauthorized disclosure of privileged documents for Friday, December 21, 1984 at 2:00 p.m.

* * * * *

61. On Friday, December 14, 1984, in preparation for the scheduled hearing of December 21, 1984 counsel for Robert Reckmeyer issued a subpoena *duces tecum* to Assistant United States Attorney Karen Tandy. In addition to requesting Ms. Tandy's appearance at the evidentiary hearing, the subpoena called for the production of all copies of the privileged June 16, 1982 letter from James Pittleman to Robert Reckmeyer in the Government's possession.

62. On December 14, 1982, a copy of document numbered 11453-11456 was returned to the Court by the government in a sealed envelope. Document Number 11453-11456 is a copy of the June 16, 1982 from James Pittleman to Robert B. Reckmeyer which had already been returned in a sealed envelope of December 3, 1984. The copy of Document numbered 11453-11456 had portions which were underlined in yellow.

Agreed to on December 28, 1984 by: Joseph J. Aronica, *Assistant United States Attorney,* Eastern District of Virginia; John M. Dowd, Heron, Burchette, Ruckert & Rothwell, Suite 700, 1025 Thomas Jefferson St., Washington, D.C. 20007.

Supreme Court of the United States

No. 84–823

UNITED STATES, PETITIONER

v.

JOHN DOE NO. 462

ORDER ALLOWING CERTIORARI. Filed *January 21, 1985.*

The petition herein for a writ of certiorari to the *United States Court of Appeals for the Fourth Circuit* is granted.

Justice Powell took no part in the consideration or decision of this petition.

Office-Supreme Court, U.S.
FILED
MAR 22 1985
ALEXANDER L. STEVAS
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No. 84-823 (6)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES OF AMERICA,

Petitioner

v.

JOHN DOE NO. 462,

Respondent

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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RESPONDENT'S MEMORANDUM SUGGESTING THAT THE CAUSE IS MOOT

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UNITED STATES OF AMERICA,

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RESPONDENT'S MEMORANDUM SUGGESTING THAT THE CAUSE IS MOOT

On January 21, 1985 the government's petition for a writ of certiorari was granted. On March 1, 1985 petitioner's brief was filed. Respondent's brief is due April 1, 1985.

Certiorari was granted in this case to resolve the issue of whether the Fifth Amendment privilege against self-incrimination protects an individual from the compelled production of his personal documents pursuant to grand jury subpoena. As discussed herein, recent developments in this case have rendered this cause moot. Respondent has waived

his Fifth Amendment privilege and provided petitioner with the very documents that are the subject of the case now pending before this Court.

On January 9, 1985, respondent was indicted for various offenses pertaining to federal marijuana, hashish, firearms, currency and tax laws.

On March 13, 1985, respondent pleaded guilty to four counts of the indictment[1] and the government agreed to dismiss all remaining charges against respondent, as well as not prosecute him for any additional violations of criminal law arising out of any of the offenses alleged in the indictment.

As part of the plea agreement, respondent agreed to cooperate fully with the government in its investigation regarding the importation and distribution of controlled substances. As part of this cooperation obligation, on March 13, 1985, respondent gave to the government all the personal books, papers and other documents called for in the subpoena *duces tecum* which are at issue now before this Court. Accordingly, the government now has possession of the same documents it is asking that this Court rule not protected by the Fifth Amendment privilege. Since respondent has waived his Fifth Amendment right as to these documents, and provided them to the government, this case is now moot.

The Solicitor General, having been advised of these developments, agrees that this case is now moot. The Solicitor

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[1]Respondent pleaded guilty to the following offenses charged in the indictment: engaging in a continuing criminal enterprise (21 U.S.C. 848); a firearms violation (26 U.S.C. 5861(d) and 5871); a currency violation (31 U.S.C. 5316); and filing a false corporate tax return (26 U.S.C. 7206(1)). *See* Indictment in *United States v. Robert Bruce Reckmeyer, et al.*, counts 2, 14, 20, 40 *Joint Appendix* at 3-66.

General has indicated that petitioner will file a suggestion of mootness, seeking an order vacating the opinion of the court of appeals in this case. *See United States v. Munsingwear*, 340 U.S. 36 (1950). Respondent does not oppose such an order.

Accordingly, respondent prays that this case be dismissed as moot.

Respectfully submitted,

JOHN M. DOWD
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March 1985

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No. 84-823

In the Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES OF AMERICA, PETITIONER

v.

JOHN DOE NO. 462

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES SUGGESTING MOOTNESS

REX E. LEE
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Amend. V 1

In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-823

UNITED STATES OF AMERICA, PETITIONER

v.

JOHN DOE NO. 462

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES SUGGESTING MOOTNESS

This case presents the question whether the Fifth Amendment privilege against compelled self-incrimination protects the contents of an individual's voluntarily prepared financial records. In March 1984, respondent was served with a grand jury subpoena demanding production of approximately a dozen kinds of common financial records. After respondent partially complied with the subpoena and had been granted act-of-production immunity, the district court quashed the subpoena in part, holding that the contents of respondent's personal financial records were protected by the Fifth Amendment privilege. The court of appeals affirmed on the same ground. This Court granted the government's petition for a writ of certiorari to review that holding on January 21, 1985.

On January 9, 1985, respondent was charged in a 48-count indictment with various violations of the federal narcotics, firearms, tax, and currency laws. On March 13, he pleaded guilty to four counts pursuant to a plea agreement. Respondent subsequently turned over to the government the documents sought by the subpoena that is at issue in this case.

As a result of respondent's production of the subpoenaed records, this case presents only a " 'question[ ] that cannot affect the rights of litigants in the case before' " the Court. *DeFunis* v. *Odegaard*, 416 U.S. 312, 316 (1974), quoting *North Carolina* v. *Rice*, 404 U.S. 244, 246 (1971). Accordingly, the case is moot. See *United States* v. *Alaska Steamship Co.*, 253 U.S. 113, 116 (1920). The judgment of the court of appeals should therefore be vacated. See, *e.g.*, *Great Western Sugar Co.* v. *Nelson*, 442 U.S. 92 (1979); *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39-41 (1950).

Respectfully submitted.

REX E. LEE
Solicitor General

MARCH 1985

DOJ-1985-03